Supreme Court, U.S.
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No. 99-____

IN THE
Supreme Court of the United States

PUBLIC CITIZEN, *ET AL.*
Petitioners,

v.

JOHN CARLIN,
ARCHIVIST OF THE UNITED STATES, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the
Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the Archivist correct in concluding that the format in which government records are stored -- electronic, paper, or microform -- is irrelevant to determining whether the records have "sufficient administrative, legal, research or other value to warrant their further preservation" under 44 U.S.C. § 3303a(d)?

2. Should a Court reviewing an agency decision under the Administrative Procedure Act, 5 U.S.C. § 706, give *Chevron* deference to interpretations of the relevant statute or regulation when the interpretations were not articulated by agency officials during the administrative proceedings, but were offered for the first time in defending the agency decision in court?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are Public Citizen, Inc., a national nonprofit corporation and membership organization with approximately 150,000 members; the American Historical Association, a non-profit association, with a membership of approximately 15,000 historians, which is the oldest and largest association of historians in the United States; the American Library Association, a non-profit association with more than 58,000 members; the Center for National Security Studies, a nonprofit public interest scholarly research institute organized and operated as a project of The Fund for Peace, Inc.; the National Security Archive, a non-profit public interest research institute and library organized and operated as a project of the Fund for Peace; the Organization of American Historians, the largest association devoted to research and teaching on the history of the United States, with a membership of approximately 12,000 members; Scott Armstrong, a journalist, author, foreign policy researcher, and founder of the National Security Archive; and Eddie Becker, a professional researcher specializing in documentary reconstruction of historical events, with a particular expertise in using computerized information.

Respondents are John Carlin, the Archivist of the United States, who is sued in his official capacity; the Executive Office of the President ("EOP"); the Office of Administration, a component agency of the EOP; and the Office of the United States Trade Representative, which is also a component agency of the EOP.

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OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 184 F.3d 900 and is set forth in the Appendix at pages 1a-20a. The opinion of the District Court is reported at 2 F. Supp. 2d 1 and is set forth at pages 21a-53a of the Appendix. The Archivist's statement concerning the adoption of the rule at issue is published at 60 Fed. Reg. 44,643-44,650 and the relevant portions are set forth at pages 56a-71a of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on August 6, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT PROVISIONS

The relevant provisions of the Records Disposal Act, 44 U.S.C. §§ 3301, 3303, 3303a, 3314 and "General Records Schedule 20," are set forth in the Appendix to this petition at 69a-75a.

STATEMENT OF THE CASE

This case concerns the rules governing the destruction of all government records created using word processors and electronic mail. These technologies are used throughout the government and, because electronic records can be used in ways that paper records cannot, they have revolutionized the way that information is recorded and exchanged. Unlike paper records, documents in electronic formats can be searched and sorted automatically; can be transmitted instantly across the country; and can be stored in electronic archives to be accessed by multiple researchers on a network. Most government records are now created using electronic technologies that store information in formats with these capabilities.

Under the Records Disposal Act, the Archivist is charged with determining whether government records should be retained or destroyed, depending on whether they have sufficient value to warrant their further preservation. The Archivist has promulgated a rule that directs agencies to destroy all records created with word processing or electronic mail, regardless of their content, once they have created a copy for record keeping purposes in an electronic, paper, or microform format. The District Court for the District of Columbia struck down this rule because it ignored the unique value of electronic records and because it applied to all records, even those worthy of preservation in their electronic format.

The Circuit Court reversed and held that 44 U.S.C. § 3303a(d) allows the Archivist to direct the wholesale destruction of these records for all agencies, as long as his rule is interpreted as requiring that agencies transfer all of the content, structure and context of the original electronic format to a paper recordkeeping system. In order to uphold the Archivist's rule, the Court of Appeals had to accept as authoritative certain interpretations of the rule and of Section 3303a(d) that were not articulated by the Archivist during the administrative proceedings, but were presented for the first time in the litigation. The Court of Appeals concluded that *Auer v. Robbins*, 519 U.S. 452 (1997), requires that courts give controlling deference to agency interpretations, even if they are first presented in the briefs of litigation counsel defending an agency decision.

A. The Records Disposal Act

The Records Disposal Act, 44 U.S.C. § 3301-3314, makes the Archivist of the United States responsible for ensuring that valuable government records, including historically important records, are not destroyed prematurely. The Act provides that

original records (and even most copies) may not be destroyed unless the Archivist has determined that the records lack "sufficient administrative, legal, research, or other value to warrant their continued preservation by the United States Government." 44 U.S.C. § 3303a(a), (d).

For most government records, this determination is made thorough individual agency record schedules. Each agency submits to the Archivist "lists" or "schedules" describing records in its custody that, in the agency's view, lack sufficient value to warrant further preservation. *Id.* § 3303. The Archivist then publishes a notice in the Federal Register describing the proposed schedule and soliciting public comment, and the National Archives and Records Administration ("National Archives" or "NARA") appraises the records to evaluate their value. If that appraisal indicates that the records have sufficient historical value, the records will eventually be transferred to the Archives as "permanent" records. 44 U.S.C. § 2107. Otherwise, the Archivist will approve a schedule authorizing disposition of the records after they have been retained for an appropriate period of time. *Id.* § 3303a(a). To ensure that records are not destroyed based solely on the agency's "immediate, operational needs," no agency may destroy records without first obtaining the Archivist's approval. *American Friends Serv. Comm. v. Webster*, 720 F.2d 29, 37, 54-57, 65 (D.C. Cir. 1983); *see also* 44 U.S.C. § 3314; *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 147 (1980).

The Records Disposal Act also authorizes "General Record Schedules," in which the Archivist mandates the destruction of certain categories of records for all agencies. The Archivist may promulgate a general schedule for the destruction of "records of a specified form or character common to several or all agencies" if he finds that "such records will not, at the end

of the periods specified [in the schedule], have sufficient administrative, legal, research, or other value to warrant their further preservation by the" government. 44 U.S.C. § 3303a(d).

General Records Schedules eliminate a number of the procedural safeguards against improper records destruction that apply to individual schedules. While individual schedules require public notice and comment on an agency's records destruction plans, no such notice is issued when records fall within a General Schedule. Moreover, where an individual agency schedule is used, an agency official must certify that the records do not, or will not, warrant retention, 36 C.F.R. § 1228.26(b), and the National Archives undertakes "a thorough study of the records that takes into account" their "historical or other value." 61 Fed. Reg. 34449 (1996). No such certification or individualized appraisal occurs where the records are covered by a General Records Schedule.

The legislative history of the statute shows that Congress anticipated that such General Schedules would be used for the disposal of "routine `housekeeping' records, such as those relating to the hiring of personnel, procurement of supplies, and fiscal management, that are common to most agencies." H. Rep. No. 361, 79th Cong., 1st Sess. 1 (1945). Accordingly, as the District Court found, "every general records schedule promulgated to date, except GRS 20, covers administrative housekeeping records common to all agencies," such as civilian personnel records, payroll records, and travel records. App. at 39a.

General Records Schedules and the individual agency schedules are not recommendations or guidelines, but are "mandatory" rules that agencies must follow. 44 U.S.C. § 3303a(b). If records are covered by a schedule, agencies must

destroy the records in accordance with the schedule unless they specifically request and obtain an exemption from the Archivist. *See* 36 C.F.R. §§ 1228.30(a), 1228.40, 1228.42(b).

B. General Records Schedule 20.

The Archivist confronted the issue of preserving historically valuable electronic records in *Armstrong v. Executive Office of the President*, 810 F. Supp. 335 (D.D.C.), *aff'd in relevant part*, 1 F.3d 1274, 1282 (D.C. Cir. 1993), when the Executive Office of the President planned to destroy, without any record schedule, the only electronic copies of its word processing and electronic mail records, including electronic mail that had been instrumental in conducting the Iran-Contra Affair. In that litigation, the Archivist's attorneys maintained that, if agencies instructed staff to print the electronic communications that qualified as "records" on paper, the electronic records need not be scheduled because they were "extra copies retained only for convenience of reference," and, therefore, were exempt from the definition of "record" in 44 U.S.C. § 3301. The District of Columbia Circuit Court rejected this claim in 1993, and held that the electronic communications are not "extra copies," but unique records that contain information not found in the paper print-outs and, therefore, may not be destroyed unless the Archivist has determined that they lack sufficient value to warrant their retention. *Armstrong v. EOP*, 1 F.3d at 1284-86.[1]

A year later, the Acting Archivist proposed to issue a General Record Schedule that would authorize the practice that

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[1] During this litigation the Archivist's counsel originally maintained, as an alternative argument, that the General Record Schedules authorized destruction of the electronic data, but later conceded that none of the records at issue were subject to the General Schedules. *See Armstrong v. EOP*, 810 F. Supp. at 342.

had been rejected in *Armstrong*. *See* 59 Fed. Reg. 52313 (Oct. 17, 1994). Despite uniformly adverse comments from the public, professional organizations, and state archivists, who urged the Archivist to appraise these records using individual agency schedules, rather than General Schedules, Archivist John J. Carlin adopted this proposal, which is known as "GRS 20." App. at 56a-71a.

GRS 20 is remarkable in three respects. First, it regards the format of the records as being irrelevant to whether the records have "sufficient administrative, legal, research, or other value to warrant" their preservation. 44 U.S.C. § 3303a(d). The Schedule provides that agencies shall delete the original, electronic version of electronic mail records if the records have been copied for recordkeeping purposes, and provides that the copy may be in "an electronic recordkeeping system, paper or microform." App. at 71a. Likewise, word processing records are to be destroyed if they have been copied to any one of these three formats and are "no longer needed for updating or revision." *Id.* at 70a-71a. Thus, all three formats are treated as being of equal value, and agencies are authorized (indeed, directed) to destroy the only electronic version of the record if they have a "hard copy" on paper or microform for recordkeeping purposes.

Second, GRS 20 is not based on whether an agency has the technical ability to retain the electronic format. Regardless of whether preservation of the records in electronic format is easy or difficult for a particular agency, GRS 20 authorizes the agency to destroy the electronic original and retain only a hard copy, without any consideration of whether it is worthwhile to retain the electronic version because it has special value for research or other purposes.

Third, GRS 20 applies to *all* agencies, and *all* types of government records, regardless of their importance or value. The Schedule covers everything created by word processing or electronic mail, from the most historically important State Department memoranda analyzing diplomatic options in the Middle East for the President, to the most trivial electronic mail discussing payments on a Small Business Administration loan.

C. The District Court's Rulings.

In 1996, the EOP agencies responsible for advising the President on international trade and science and technology planned to rely on GRS 20 to destroy electronic records that had been preserved as a result of the *Armstrong* litigation. App. at 32a. Petitioners brought this action challenging GRS 20 under 28 U.S.C. § 1331. The district court concluded that the Schedule should be set aside because it is inconsistent with the statute.

The district court observed that, because GRS 20 is indifferent to format, it assumes that "a paper copy invariably adequately preserves" the value of an electronic record "in *all* cases." App. at 48a. This premise is illogical because the "differences between electronic and paper records illustrate the fact that the administrative, legal, research and historical value of electronic records is not always fully captured -- by paper or microfiche copies." App. at 46a. Citing the Archivist's own statements, the Court summarized the unique features of electronic records:

> For example, records in electronic recordkeeping systems have searching, manipulating and indexing capabilities not found in paper records, an advantage recognized by NARA itself. *See* Notice of Issuance of General Records Schedule, 60 Fed. Reg. at 44,643. In addition, electronic records can be transmitted over telephone or

> communication lines and therefore can be distributed or made available to the public more readily than paper copies. [citing NARA, Final Rule, 60 Fed. Reg. 44,634, 44,639 (1995)]. Finally and most importantly, electronic records often contain information that is not preserved in a print-out record or even in other computerized systems of records.

Id. (footnotes omitted).

More specifically, the district court found that GRS 20 was flawed in three respects. First, comments on the GRS 20 proposal protested that it was inconsistent with the Archivist's manuals, which state that, because general schedules are for records that have the same value regardless of the agency that creates them, such schedules should only be used for "administrative records," and should not be used for "program records." NARA, DISPOSAL OF FEDERAL RECORDS, IV-9, IV-10 (1992). "Administrative records" are those relating to "budget, personnel, supply, and similar housekeeping, or facilitative, functions common to most agencies," *Id.* at D-1, while "program records" document "the unique substantive functions for which an agency is responsible." *Id.* at D-11. The Archivist did not respond to these comments.[2] The district court agreed with the comments, and moreover, concluded that "Congress did not intend that records of such disparate value be

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[2] In response to other comments, the Archivist did amend the provision of GRS 20 governing spreadsheets to clarify that it applies "only if [the spreadsheets] support administrative, rather than program functions or if they were generated by an individual only for background purposes." App. at 68a. Other provisions of GRS 20 are also expressly limited to "administrative" records. *See* 60 Fed. Reg. at 44,648/1, item 3.b. The provisions governing word processing and electronic mail records are not subject to such a limitation.

lumped together under one disposition schedule." App. at 38a-43a.

Second, comments on the GRS 20 proposal also objected that, because the Schedule covered everything from high-level policy memoranda to trivial correspondence, the Archivist could not rationally find that all the records covered by the Schedule do not have sufficient value to warrant their further preservation. In adopting GRS 20, the Archivist made no such finding. On review, the district court held that the Archivist's failure to make the determination required by statute was an independent ground for setting aside GRS 20, and rejected as irrational the Archivist's "implicit" finding that *all* word processing and electronic mail records lack value once copied to paper. App. at 48a.

Finally, the district court focused on the language of the statute requiring that general schedules authorize disposal "after the lapse of specified periods of time." 44 U.S.C. § 3303a(d). GRS 20 did not specify a time period for retention but left the task of establishing specific retention periods to the agencies. *See* App. at 49a. The district court held that, by leaving the determination of the retention period to the agencies, GRS 20 turns the statute "on its head" and ignores Congress's directive that the Archivist must specify the retention period so that agencies do not destroy records prematurely or retain them for too long. *Id.* at 49a-50a.

The district court emphasized that its ruling did not hamper the government's ability to manage electronic records because the Archivist may promulgate general schedules covering electronic records that document administrative functions, and agencies remain free to submit individual agency schedules for program records. *Id.* at 51a. Shortly after the district court's decision, the Archivist directed a task force to draft new

procedures for scheduling electronic records using general schedules for administrative records and individual schedules for program records. *See* 63 Fed. Reg. 39,195 (July 21, 1998)

Moreover, the Archivist declared that he agreed that general records schedules should be "limited to common administrative records," 63 Fed. Reg. 54,503, 54,504/3 (Oct. 9, 1998); *see also* John W. Carlin, *Moving Ahead on Electronic Records Challenges*, THE RECORD, Vol. 4, No. 3, at 4 (Jan. 1998) ("In my view GRS-20 needs changing. General records schedules definitely have their place, but they should be applied to the disposition of routine administrative 'housekeeping' records, not to programmatic records."). Furthermore, the Archivist declared that he "has determined that indefinite retention periods," such as "destroy when no longer needed" are "inappropriate under the GRS," and proceeded to replace schedules that use such language with "more specific retention periods." 63 Fed. Reg. 41,869 (Aug. 5, 1998).

D. The Circuit Court's Decision.

The Court of Appeals reversed and upheld GRS 20 because, in contrast to the district court, it accepted the agency's conclusion that, in all cases, "a record in electronic form lacks sufficient value to warrant preservation once it is transferred intact to a paper recordkeeping system." App. at 18a.

The Court of Appeals maintained that this conclusion was supported by two sets of statements in the Archivist's preamble. First, it cited the Archivist's statements that the benefits of electronic records are significant "only for electronic records that are maintained in an electronic recordkeeping system." App. at 14a-15a; *accord id.* at 13a, 17a-18a ("electronic records are of limited use unless maintained in

a recordkeeping system").[3] Second, the Court of Appeals endorsed the Archivist's decision to allow each agency to decide whether its records will be collected in an electronic, paper or microform recordkeeping system. *Id.* at 16a-17a. According to the Court, allowing agencies to choose the format for storing records based solely on their operational needs did not ignore the research or historical value of the records because the only alternative would be for the Archivist to require all agencies "either to establish electronic recordkeeping systems immediately or to retain their electronic records until such time as they have electronic recordkeeping systems." *Id.* at 17a.

The Court of Appeals also rejected the district court's three reasons for finding GRS 20 is inconsistent with 44 U.S.C. § 3303a(d), but did so based on interpretations that were first articulated in litigation by counsel or the Court of Appeals, not by the Archivist:

- In response to the argument that GRS 20 was inconsistent with the Archivist's statements that General Schedules should only be used for "administrative," not "program," records, *see supra* 8, the Court of Appeals concluded that GRS 20 did not represent an unexplained departure because, it stated, the prior statements "apparently concerned authorizations to discard the only extant version of a record, not a record that had been copied to a recordkeeping system." App. at 10a. This limitation does not appear in the prior statements, and had never been articulated by the Archivist.

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[3] A "recordkeeping system" is defined as a system "in which records are collected, organized, and categorized to facilitate their preservation, retrieval, use and disposition." 34 C.F.R. § 1220.14, and an "electronic recordkeeping system" is an electronic system that performs these functions. *Id.* § 1234.2.

- The Court of Appeals rejected the district court's holding that GRS 20 failed to provide for disposal of records "after the lapse of specified periods of time," 44 U.S.C. § 3303a(d), by concluding that a "specified period of time" may be an occurrence, such as the transfer of the records to a recordkeeping system. App. at 12a. Althought the Court of Appeals accepted this as "the Archivist's interpretation of § 3303a(d)," this construction was first articulated by litigation counsel. *Id.* at 12a-13a & n.*. In endorsing this new interpretation, the Court did not explain how this occurrence could be "the lapse of" a specified period of time required by the statute.

- The Court of Appeals also rejected the district court's ruling that GRS 20 was flawed because information in the original electronic record may not be preserved in print outs or other copies. App. at 44a-46a. Despite the decision in *Armstrong v. EOP*, and comments in the rule making proceedings that print-outs do not contain all of the information in the electronic original, GRS 20 does not state that the recordkeeping copies must preserve all the information contained in the electronic format. *See id.* at 70-71a (specifying information that must be captured in recordkeeping system in Note). In the district court, the Archivist did not dispute that GRS 20 contains no such requirement. In the Court of Appeals, however, appellate counsel asserted that GRS 20 requires retention of *all* information in the electronic original. The Court of Appeals concluded that, under this Court's decision in *Auer v. Robbins*, 519 U.S. 452, 461 (1997), the new interpretation offered by appellate counsel is entitled to deference that makes it "'controlling unless plainly erroneous or inconsistent with the regulation,'" App. at 19a.

REASONS FOR GRANTING THE WRIT

I. THE ISSUE OF WHETHER AGENCIES SHOULD DESTROY ELECTRONIC RECORDS ONCE THEY HAVE BEEN COPIED TO ANOTHER FORMAT IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT.

The issue of how computer-generated records are treated under the federal records laws is an important question of federal law that should be decided by this Court. The decision below directly affects the preservation of an enormous and growing body of federal records: all documents created by federal agencies with word processing or electronic mail, regardless of their historical importance.[4] All agencies use word processing to create government records, and agencies are increasingly using electronic mail technologies to carry-out government business. 60 Fed. Reg. 44,634 (1995). Indeed, "virtually all materials that are printed today exist at some point in an electronic format that could also be used to support dissemination using other technologies." H.R. Rep. No. 215, 103d Cong., 1st Sess. 5 (1993). Moreover, the Court of Appeal's interpretation of how the "value" of records is determined under 44 U.S.C. § 3303a(d) potentially affects all records in digital formats -- from the formats routinely used to make information available on the Internet to sophisticated databases.

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[4] The Records Disposal Act governs not only executive agencies, but establishments in the legislative and judicial branches as well. 44 U.S.C. § 2901(14). The Act exempts the Supreme Court, the Senate, the House of Representatives, the Architect of the Capital, and units within the EOP that solely advise the President. *Id.*; *Armstrong v. EOP*, 1 F.3d at 1290-93.

It is now widely recognized that the unique characteristics of these electronic formats often make them significantly more valuable than paper print-outs of the same information. Electronic records can be distributed more easily and more widely, as illustrated by the development of the Internet and the fact that this Court, and other federal courts, now use computers to make their decisions available worldwide in a fraction of the time that it takes to distribute printed slip opinions.[5] Electronic records can be searched and indexed more easily, as illustrated by electronic legal research services that allow attorneys to locate legal authorities that could not be identified using paper records.[6] Electronic records can also be stored in ways that paper records cannot, as illustrated by the development of systems for filing all court papers electronically in order to relieve overburdened court clerks and increase the efficiency of the court system.[7] Moreover, the law governing access to federal records allows private requesters to specify

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[5] *See* Comments of the Department of Justice Before the Judicial Conference of the United States, ¶ 3 (March 14, 1997) ("The advent of computerization and high-speed data transmission makes swift and accurate access to judicial opinions feasible in a way that was unimaginable 25 years ago.")

[6] *Matthew Bender & Co. v. West Publ. Co.*, 158 F.3d 693, 697-98, 705-06 (2d Cir. 1999), *cert. denied,* 522 U.S. 3732 (1999); *see also United Transportation Union-Illinois v. Surface Transportation Board*, 132 F.3d 71, 74 (D.C. Cir. 1998) (it was "eminently reasonable" for an agency to require parties to submit both paper and electronic versions of textual documents and spreadsheets because the electronic version allows the agency "to use a computer to search those documents for key information.")

[7] *See* Admin. Office of the U.S. Courts, *Electronic Case Files in the Federal Courts: A Preliminary Examination of Goals, Issues and the Road Ahead*, 2-3 (March 1997).

the form or format in which electronic records are made available to the public, and requires that the government make certain records available in both electronic and paper formats. *See* 5 U.S.C. § 552(a)(2), (a)(3)(B); *see also* 44 U.S.C. § 4101 (requiring Superintendent of Documents to provide online access to government publications).

The importance of record format is also reflected in the treatment of historically valuable records that have been evaluated outside the context of GRS 20. When the National Archives has examined electronic records under individual agency schedules, it has sometimes concluded that the electronic format of the records is more valuable than paper, or that both hard copy and electronic formats are worthy of retention. For example, the record below shows that archivists appraising electronic mail records written by the staff of the Office of the United States Trade Representative over a seven year period concluded that it would be better to preserve the thousands of historically valuable messages in an electronic form that could be automatically indexed, rather than save paper copies. Similarly, archivists decided that records from the State Department's electronic communications system and the Congressional Record should be permanently retained in *both* the electronic and hard copy formats because of the unique properties of each format. While paper copies may be an adequate substitute for the electronic original in some cases, for many historically important records, even if a paper copy exists, the electronic format has sufficient value to warrant its preservation.

GRS 20 and the decision below, however, impose a result that is directly contrary to this experience because they treat record formats as fungible. According to the Archivist and the Court of Appeals, whether the records are stored on paper, microfiche or an electronic medium is irrelevant to whether

they have "administrative, legal, research or other value" under 44 U.S.C. § 3303a(d).

This counter-intuitive result springs from an erroneous legal premise. The Court of Appeals assumed that the Archivist was faced with giving agencies complete discretion to choose the format of their records (as he did in GRS 20), or requiring that all agencies establish electronic record keeping systems. App. at 17a. Nothing in the statute imposes such an all or nothing dichotomy. The Records Disposal Act does not provide that, if the Archivist does not adopt GRS 20, he must adopt a rule that requires *all* agencies to preserve *all* their electronic records in an electronic format. Rather, under the statute, the alternative to GRS 20 is for the Archivist to approve individual agency schedules and/or narrower general schedules that distinguish electronic records that are worth preserving from those that are not.

As the district court recognized, petitioners "are not challenging the destruction of electronic records *per se*" and acknowledge that the destruction of electronic mail and word processing records pursuant to more narrowly focused schedules "certainly will be necessary and practical. Plaintiffs only challenge the use of a General Record Schedule to schedule the destruction of electronic records, without distinguishing valuable electronic records from useless ones." App. at 31a (footnote admitted). While preserving electronic mail and word processing records in their original form may, in many cases, not be worthwhile because the records are of minimal value and/or preserving them is costly, this is not true of for *all* records at *all* agencies. "The solution," as the district court observed, is "not to absolve all agencies of using electronic recordkeeping systems" but to use more specific general schedules and individual agency schedules to assure that, where the unique value of the electronic format is

important and can be preserved, the electronic records are not destroyed. *Id.* at 52a.[8]

The decision below also construes 44 U.S.C. § 3303a(d) in a way that seriously distorts this important statute. The Court of Appeals concluded that the Archivist made the determination of value required by the statute by finding that "electronic records are of limited use unless maintained in a recordkeeping system," App. at 17a-18a. This finding, however, is not the same as finding that the electronic records lack *any* "administrative, legal, research or other value" that would warrant further preservation, as 44 U.S.C. § 3303a(d) requires. Even if word processing and electronic mail records must be maintained in an organized "recordkeeping system" to be fully useful to the agency and researchers, the question of whether the format of the recordkeeping system should be electronic, paper, or microform remains. However, the Court of Appeals' construction of Section 3303a treats the format of the recordkeeping system as irrelevant to the determination of

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[8] The Court of Appeals' assertion that 44 U.S.C. § 3303(1) is analogous to GRS 20, *see* App. at 9a-10a, illustrates the error in its analysis. This statute allows agencies to submit lists of records that have been photographed or micrographed to the Archivist. It does not, however, permit agencies to destroy the original records after they have been photographed or micrographed. Rather, these lists are treated in the same way as individual agency record schedules; the Archivist must publish a notice for comment in the Federal Register, conduct an appraisal of the records identified in the list, and make a specific determination that the records listed lack sufficient value to warrant their preservation. 44 U.S.C. § 3303a(a). Thus, disposition under § 3303(1) is not analogous to GRS 20, which directs the destruction of records copied to another format without any consideration of the value of the original format. To the contrary, § 3303(1) supports the district court's conclusion that the Archivist cannot authorize the destruction of records solely because they have been copied to microform.

value required by the statute and, thus, eliminates consideration of the unique value associated with electronic record formats.[9]

Moreover, the Circuit Court's opinion confuses the issue of whether records are disorganized, which can always be corrected, with the irreversible decision to destroy them. Other provisions of the federal records statutes and regulations require that agencies organize and control their records by prescribing how records shall be maintained, including specifying how records should be filed. *See* 36 C.F.R. §§ 1222.32(c); 1222.50(b), 1220.36. These regulations already provide that, if an agency retains the electronic records, the records must be controlled, indexed, and filed. *Id.* § 1222.50(b)(1). The function of disposition schedules under 44 U.S.C. § 3303a is not to require that records be organized, but to mandate their destruction. Thus, the significance of GRS 20 is not that it encourages maintaining records in a "recordkeeping system," but that it directs agencies to destroy the only electronic version of records once records are copied to paper or microform -- without regard for the research and historical value of the original, electronic format.

There is no conflict among the circuits on this issue, but that does not diminish the importance of review by this Court. Because of the District of Columbia Circuit's unique position in determining the law applicable to federal agencies located in

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[9] The Court's assumption that electronic mail and word processing systems generally do not have the characteristics of an "electronic recordkeeping system" (i.e., the ability to collect, organize, and categorize records, 44 U.S.C. § 1234.2), is, at best, overstated as these applications generally organize documents and messages in folders and files, generate indices of the folders, and can search for records electronically. Moreover, the electronic format of these records may have links or connections between records that are unique to the electronic format.

the nation's capital, its decision is dispositive with respect to the vast majority of electronic records subject to destruction under the Archivist's rule. Moreover, Petitioners represent the leading associations for the professions that are most directly and dramatically harmed by this rule. As the district court recognized, the current and future destruction of records under GRS 20 causes these individuals and institutions "distinct and palpable injury." App. at 28a-30a. This injury is irreparable and becomes more severe each day that GRS 20 remains in effect.

"Our ability to preserve and make available a full and rich documentary history depends on archivists determining what records are of lasting value and which are not." S. Rep. No. 373, 98th Cong., 2d Sess. 10 (1984), *reprinted in* 1984 U.S.C.C. A. N. 3865, 3875. The Court of Appeals' decision construes the Records Disposal Act in a way that makes the format of records irrelevant to these crucial determinations. Because of the importance of this issue to properly preserving the history now being written on computers, this Court should review the decision below.

II. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUIT COURTS OVER WHETHER COURTS MUST DEFER TO AGENCY INTERPRETATIONS FIRST ARTICULATED IN JUDICIAL REVIEW LITIGATION.

The decision below accepts, as authoritative, policy decisions on the interpretation of the Records Disposal Act and GRS 20 that were not made by the Archivist, but by litigation counsel. Indeed, the interpretations endorsed by the Court of Appeals not only do not appear in the Archivist's explanation of GRS 20, but they appear to be in tension with, if not directly contrary to, his policy statements. *See supra* at 10, 11-12. The

circuit courts are split over whether agency litigating positions should be accepted as authoritative interpretations in circumstances such as this, and this Court should resolve the conflict.

In *Securities and Exchange Comm'n v. Chenery*, 318 U.S. 80 (1942), this Court held that a reviewing Court may not affirm an agency decision on a rationale that was not articulated by the agency when it made the decision, but developed during litigation. In *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-13 (1988), this Court stated, in emphatic terms, that the deference normally accorded agency interpretations of statutes does not apply where the interpretation "appears to be nothing more than an agency's convenient litigating position." These basic tenets of administrative law serve to assure that discretionary decisions to construe a statute in a particular manner, or adopt a particular policy, are made by agency officials during the administrative process -- not by litigation counsel or courts in the course of judicial review. *See Chenery*, 318 U.S. at 88-89, 92-94; *see also Investment Co. Institute v. Camp*, 401 U.S. 617, 627-28 (1971).

In two instances, this Court has explicitly deferred to interpretations first articulated in litigation. In *Gardebring v. Jenkins*, 485 U.S. 415 (1988), this Court rejected alternative interpretations of a Social Security regulation in favor of the interpretation first articulated in an *amicus* brief submitted by the agency. *Id.* at 429-30. In *Auer v. Robins*, 519 U.S. 452 (1997), this Court held that the interpretation of a regulation presented in an *amicus* brief filed on behalf of the Secretary of Labor was entitled to "controlling" deference, unless plainly erroneous or inconsistent with the regulation where "[t]he Secretary's position is in no sense a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action

against attack." 519 U.S. at 462 (quoting *Bowen*, 488 U.S. at 212).

Several circuits have concluded that the deference afforded in *Gardebring* and *Auer* is limited to the circumstances presented in those cases, namely where (i) the agency is not a party but submits an *amicus* brief, and (ii) the brief presents an interpretation on an issue that the agency has not previously addressed. In *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 563 (1999), the Seventh Circuit refused to defer to a statutory interpretation presented in an agency's *amicus* brief. Although *Auer* indicates that an *amicus* brief is entitled deference "in some circumstances," Judge Posner stated that no deference should be accorded where "the agency has, and has exercised, rulemaking powers yet has unaccountably failed to address a fundamental issue on which the brief takes a radical stance," and the issue is so far-reaching that a more "deliberative, public, and systematic procedure than the filing of an amicus curiae brief," should be required to claim deference. *Id.* at 563. The Fourth, Eighth and Ninth Circuits have also stated that, under *Auer*, they will accept interpretations first articulated in *amicus* briefs only where the interpretation "is in no sense a *post hoc* rationalization advanced to defend its past action against attack, and there is simply no reason to suspect that the proffered interpretation does not reflect" the agency's "fair and considered judgment."[10]

In accord with this view of *Gardebring* and *Auer*, where the agency articulates the interpretation for the first time in

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[10] *Jones v. American Postal Workers Union*, 1999 U.S. App. LEXIS 21637, 1999 WL 704691 (4th Cir. Sept. 10, 1999); *accord Hertzberg v. Dignity Partners, Inc.*, 1999 U.S. App. LEXIS 20289, 1999 WL 651947 (9th Cir. Aug. 27, 1999); *Northwest Bank of Minnesota v. Sween Corp.*, 118 F.3d 1255, 1259 n.5 (8th Cir. 1997).

litigation challenging the agency's action, most circuits apply *Bowen* and refuse to defer to the interpretation. *See, e.g., Harco Holdings, Inc. v. United States*, 977 F.2d 1027, 1035 (7th Cir. 1992) (court will not defer to IRS interpretation of its own regulation where interpretation arose after litigation began, citing *Bowen*); *CSI v. Hydrostatic Tester, Inc.*, 62 F.3d 136 (5th Cir. 1995) (court adopts as its own a tax court opinion that, quoting *Bowen*, rejects IRS interpretation of regulation first advanced in litigation); *Williams Brothers Inc. v. Pate*, 833 F.2d 261, 265 (11th Cir. 1987) (court refuses to defer to interpretation of agency regulation where it is a "mere litigating position" first argued on appeal).

The Third Circuit and the District of Columbia Circuit have taken contrary positions. The Third Circuit has held that *Gardebring* indicates that *Bowen* only applies to agency interpretations of statutes, and courts must give controlling deference to agency interpretations of regulations, even if proffered for the first time in litigation challenging the agency's action. *Connecticut Gen. Life Ins. Co. v. Commissioner of Internal Revenue*, 177 F.3d 136, 144 (3d Cir 1999), *petition for certiorari pending*, Petition No. 99-258.[11]

The District of Columbia Circuit has gone further. Citing *Auer*, that Circuit has accepted interpretations of regulations and statutes first articulated in litigation where the agency is a party, and counsel offers the new interpretation to defend the agency's action. For example, in *Tax Analysts v. IRS*, 117 F.3d 607 (D.C. Cir. 1997), the Court stated that it was not precluded from giving *Chevron* deference to an interpretation of a statute

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[11] This petition seeks review of whether IRS interpretations of tax regulations that are first advanced by IRS counsel as litigating positions are entitled to deference.

that was "merely a litigating position" of the defendant agency "so long as it represented the IRS's 'fair and considered judgment on the matter.'" *Id.* at 613 (quoting *Auer*, 519 U.S. at 462). In *National Mining Ass'n v. Babbitt*, 172 F.3d 906, 910-11 (D.C.Cir. 1999), appellate counsel advanced an interpretation of an agency regulation that was contrary to the agency's position in the district court. Nonetheless, the Circuit Court accepted the interpretation as the agency's own. *See also United Seniors Ass'n v. Shalala*, 182 F.3d 965 (D.C. Cir. 1999) ("[e]ven if the legal briefs contained the first expression of the agency's views, under the appropriate circumstances we would still accord them deference so long as they represented the agency's 'fair and considered judgment on the matter.'" ((*quoting Auer v. Robbins*, 519 U.S. 452, 462 (1997)).[12]

The decision below represents a particularly dramatic and broad application of the District of Columbia Circuit's position because the decision defers to interpretations of the Records Disposal Act and GRS 20 that were never articulated by the Archivist when the issues were raised during the administrative process, but were first proposed by litigation counsel on review. Moreover, the Court of Appeals' deference here was critical to the outcome. Specifically, the Court of Appeals relied on new interpretations for three determinations: (1) its conclusion that the Archivist's statements prohibiting the use of general schedules for "program" records do not apply to GRS 20; (2) its construction of the "lapse of a specified period of time" language in the statute; and (3) its interpretation of GRS 20 itself. *See supra* 11-12. In each of these instances, the Court

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[12] The Second Circuit has noted the D.C. Circuit's practice of accepting litigation positions, but has not decided whether it would follow this practice. *See General Signal Corp. v. Commissioner of Internal Revenue*, 142 F.3d 546, 548 n.1 (2nd Cir. 1998).

accepted as the authoritative view of the Archivist a litigation position developed *post hoc* to "defend past agency action against attack." *Auer*, 519 U.S. at 462.

Proponents of the view that "an interpretive theory put forth only by agency counsel in litigation, which explains agency action that could be explained on different theories, constitutes an 'agency position' for the purposes of *Chevron*," contend that a position articulated by litigation counsel is as authoritative as any other. *See Church of Scientology v. IRS*, 792 F.2d 153, 165-66 (D. C. Cir. 1986) (Silberman, J., concurring); *but see* 792 F.2d at 162 n. 4 (Scalia, J.) (concluding that interpretation articulated by counsel must be rejected because it fails to explain agency actions). We believe that the proponents' view is inconsistent with *Chenery* and the rationale behind *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As this Court has observed, "[b]ecause statutory and regulatory interpretations furnished [in litigation] occur *after* the agency proceedings have terminated, they do not constitute an exercise of the agency's delegated lawmaking powers." *Martin v. Occupational Safety & Health Review Commission*, 499 U.S. 144, 156-57 (1991) (italics in original). Moreover, when Congress leaves "gaps" for agency officials to fill, it delegates interpretive power to duly appointed agency officials acting in accordance with rule making and adjudicatory procedures, not to counsel writing briefs. *See Investment Co. Institute v. Camp*, 401 U.S. at 628.

Furthermore, while agency policy judgments in interpreting statutes and regulations may be based on a variety of factors, the positions developed by litigation counsel will be driven primarily, if not exclusively, by the narrow interest in defeating the specific challenge presented in the litigation. *See* Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 YALE J. REG. 1, 60-61 (1990) (litigation positions

motivated by advocate's bias should not be afforded *Chevron* deference); Scalia, *Judicial Deference To Administrative Interpretations of Law,* 1989 DUKE L. J. 511, 519-20("Whatever else an agency's choice among the various interpretive options may be based upon, it should not be based upon the desire to win a particular lawsuit.") Thus, there is no assurance that the interpretations first articulated by counsel will reflect the same policy decisions that agency officials would adopt in an administrative proceeding. *Scalia, supra* at 519 ("there may be reason to doubt whether the position taken by a low level agency litigator, or perhaps even by the general counsel, has the approval of the agency head.") Indeed, often, as in this case, it is the Justice Department, not employees of the agency charged with administering the statute, that serves as litigation counsel and is most directly responsible for interpretations first articulated in briefs.

This Court should resolve the conflict between the circuits on this issue because it will inevitably lead to inconsistent application of federal law among the circuits. Because the District of Columbia and Third Circuits defer to the agency's litigation position as controlling, but other Circuits continue to apply *Bowen*, litigation positions that are controlling in the circuits granting deference will be rejected in other circuits that conclude that the litigation position is not the most persuasive or reasonable construction of the law. *Cf. Martin v. OSHRC*, 499 U.S. at 150 & n.4 (circuit courts reach inconsistent results because of a division over whose reasonable interpretation of regulations is entitled to deference); *compare Paralyzed Veterans of Am. v. D.C. Arena*, 117 F.3d 579 (D.C. Cir. 1997), *cert. denied* 118 S. Ct. 1194 (1998) (court finds private party in violation of regulations because it treats agency interpretation in technical manual as controlling), *with Caruso v. Blockbuster-Sony Music Entertainment Centre*, 174 F.3d 166, 174-77 (3d

Cir. 1999) (court reaches opposite result because it concludes the agency interpretation is not entitled to deference). The uniform application of federal law requires that the circuits apply the same rule in deciding whether to treat particular agency positions as authoritative.

CONCLUSION

This Court should issue a writ of certiorari to review the District of Columbia's holding that GRS 20 is consistent with the Records Disposal Act.

Respectfully submitted,
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APPENDIX

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 20, 1998
Decided August 6, 1999
No. 97-5356

Public Citizen, et al.,
Appellees

v.

John Carlin, Archivist of the United States, et al.,
Appellants

Consolidated with
98-5173

Appeals from the United States District Court
for the District of Columbia
(No. 96cv02840)

Matthew M. Collette, Attorney, U.S. Department of Justice, argued the cause for appellants. With him on the briefs were Frank W. Hunger, Assistant Attorney General, Douglas N. Letter, Appellate Litigation Counsel, and Miriam Nisbet, Special Counsel for Information Policy, National Archives and Records Administration.

Michael E. Tankersley argued the cause for appellees. With him on the brief was Alan B. Morrison.

Before: Silberman, Williams, and Ginsburg, Circuit Judges.

Opinion for the Court filed by Circuit Judge Ginsburg.

Ginsburg, Circuit Judge: In 1995 the Archivist of the United States promulgated General Records Schedule 20 pursuant to his

authority under the Records Disposal Act. *See* 44 U.S.C. § 3303a(d). GRS 20 requires each federal agency to which the RDA applies to dispose of word processing and electronic mail files located in personal computers once it has copied them to a paper or an electronic record- keeping system. *See General Records Schedule 20; Disposition of Electronic Records*, 60 Fed. Reg. 44,643 (1995).

Public Citizen and others sued the Archivist, the Executive Office of the President, and two components of the EOP (hereinafter collectively referred to as the Archivist) under the Administrative Procedure Act, alleging that GRS 20 violates the RDA and is arbitrary and capricious. The district court agreed and, on cross-motions for summary judgment, entered a declaratory judgment holding the schedule invalid. *See Public Citizen v. Carlin*, 2 F. Supp. 2d 1 (D.D.C. 1997) (Carlin I).

The Archivist now appeals. We hold that GRS 20 is valid and therefore reverse the judgment of the district court. Because we uphold GRS 20, we need not decide whether, as the Archivist maintains, the Executive Office of the President may not properly be sued as an "executive agency" subject to the Federal Records Act, *see id.* at 8-9, nor whether the district court lacked the power to enter an injunction ordering the Archivist to comply with its declaratory judgment holding the schedule invalid. *See Public Citizen v. Carlin*, 2 F. Supp. 2d 18, 20 (D.D.C. 1998) (*Carlin II*).

I. Background

The Federal Records Act is a collection of statutes governing the creation, management, and disposal of records by federal agencies. *See* 44 U.S.C. §§ 2101-18, 2901-09, 3101-07, 3301-24. The RDA portion of the FRA establishes the exclusive means by which records subject to the FRA may be discarded. *See id.* § 3314; *see also id.* § 3301 (defining "records").

The RDA requires an agency to get the approval of the Archivist before disposing of any record. *See Armstrong v. EOP*, 1 F.3d 1274, 1279 (D.C. Cir. 1993). This is ordinarily done in

either of two ways. In one the agency submits to the Archivist a list or schedule of records it proposes to discard, *see* § 3303, which the Archivist may approve only if he determines that the records "do not, or will not after the lapse of the period specified, have sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government." § 3303a(a). In the other the Archivist promulgates a schedule listing types of records held by multiple agencies, which he has determined pursuant to the same standard of value should be discarded. *See* § 3303a(d). Whether the agency or the Archivist initiates the process, however, for the Archivist to authorize the disposal of a record is to order its disposal. *See* § 3303a(b). If the Archivist errs in authorizing disposal, therefore, valuable federal records could be lost forever.

Items 13 and 14, the only parts of GRS 20 challenged here, authorize the disposal of word processing and electronic mail files that have been copied to an agency recordkeeping system from a personal computer (whether stand-alone or networked). *See* GRS 20, 60 Fed. Reg. at 44,649/1.* In the preamble to GRS 20 the

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* The challenged items provide:

> 13. Word Processing Files
> Documents such as letters, memoranda, reports, handbooks, directives, and manuals recorded on electronic media such as hard disks or floppy diskettes after they have been copied to an electronic recordkeeping system, paper, or microform for recordkeeping purposes.
> Delete from the word processing system when no longer needed for updating or revision.
>
> 14. Electronic Mail Records
>
> Senders' and recipients' versions of electronic mail messages that meet the definition of Federal records, and any attachments to the record messages after they have been copied to an electronic recordkeeping system, paper or microform for recordkeeping purposes.
>
> Delete from the e-mail system after copying to a recordkeeping system.

Archivist explained that a federal agency needs the authority to delete files from personal computers in order "to avoid system overload and to ensure effective records management." *Id.* at 44,644/2. He also explained that for

> records to be useful they must be accessible to all authorized staff, and must be maintained in recordkeeping systems that have the capability to group similar records and provide the necessary context to connect the record with the relevant agency function or transaction. Storage of electronic mail or word processing records on electronic information systems that do not have these attributes will not satisfy the needs of the agency or the needs of future researchers.

Id. at 44,644/1.

II. Analysis

Public Citizen argues that in promulgating GRS 20 the Archivist exceeded his statutory authority in two respects: first, by applying the schedule to so-called "program" records, as opposed to "housekeeping" or administrative records, and second, by failing to set a specific time period for the retention of records before their disposal. Public Citizen also challenges as arbitrary and capricious the Archivist's determination that electronic mail and word processing files lack sufficient value to warrant continued preservation after they have been copied and placed in an agency recordkeeping system.

A. Statutory Authority

Because the Archivist, as head of the National Archives and Records Administration, is charged with administering the RDA, *see* 44 U.S.C. § 3302, we review his interpretation of the Act under the two-step analysis of *Chevron U.S.A., Inc. v. NRDC*, 467

(Note: Along with the message text, the recordkeeping system must capture the names of sender and recipients and date (transmission data for recordkeeping purposes) and any receipt data when required.)

U.S. 837 (1984). Under step one, we ask "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If, however, the statute is silent or ambiguous with respect to the specific issue, then at step two we "must defer to the agency's interpretation so long as it is reasonable, consistent with the statutory purpose, and not in conflict with the statute's plain language." *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 814 (D.C. Cir. 1998).

1. Housekeeping versus program records

According to Public Citizen, "GRS 20 is contrary to law because it...authorizes destruction of all types of word processing and electronic mail records without regard to content." More specifically, Public Citizen claims § 3303a(d) applies only to an agency's "housekeeping" records--that is, records that relate to routine administrative chores such as personnel and procurement--and that the Archivist exceeded his statutory authority by promulgating a general records schedule covering "program" records, which document an agency's substantive functions.

a. *Chevron* step one

We begin the interpretive enterprise, as always, with the text of the statute. *See Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 405 (D.C. Cir. 1996). As the Archivist observes, § 3303a(d) makes no reference either to program or to house-keeping records; rather, it authorizes him to schedule for disposal "records of a specified form or character." Because this term is nowhere defined in the RDA, "our task is to construe it in accord with its ordinary or natural meaning." *Director, Office of Workers' Comp. Pgms., Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994). And § 3303a(d) is naturally read to authorize the Archivist to schedule records in the "form" of word processing

and electronic mail files. *See* WEBSTER'S NEW INT'L DICTIONARY UNABRIDGED 992 (2d ed. 1942) ("In general, *form* is the aspect under which a thing appears, esp. as distinguished from substance" (emphasis in original)). Moreover, as the Archivist observes, elsewhere in the RDA "form" is used to describe the physical attributes of a record rather than its content. *See* § 3301 ("'records' includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics"). Indeed, we notice that in 1976 the Congress amended § 3301 to provide that "records" may be in the "form" of "machine readable materials." Federal Records Management Amendments of 1976, Pub. L. No. 94-575, s 4(c)(2), 90 Stat. 2723, 2727.

Although Public Citizen would have us read § 3303a(d) so as not to authorize the Archivist to schedule a record in the form of a word processing or electronic mail file if its content relates to a program function of the agency, it offers no interpretation of the statutory term "form." On the contrary, Public Citizen concedes that the "phrase ['of a specified form or character'] in isolation includes program records." Apparently, then, it means to suggest either that the term "form" really means "content" or that it should be ignored. We can not accept either suggestion. *See Edison Elec. Inst. v. EPA*, 996 F.2d 326, 335 (D.C. Cir. 1993) (elementary canon of construction that court will not read word out of statute).

Public Citizen tries to overcome the plain meaning of the statute--which seems to reject rather than to compel the proffered distinction between program and housekeeping records--exclusively by resort to the legislative history of the RDA. As Judge Easterbrook has explained, however:

> The political branches adopt texts through prescribed procedures; what ensues is the law. Legislative history may show the meaning of the texts--may show, indeed, that a text "plain" at first reading has a strikingly different meaning--but may not be used to show an "intent" at variance with the meaning of the text.

In re Sinclair, 870 F.2d 1340, 1344 (7th Cir. 1989) (enforcing statute prohibiting conversion of bankruptcy case from chapter 11 to chapter 12 despite conference report saying conversion possible and describing circumstances in which it should occur); *see also* Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899) ("We do not inquire what the legislature meant; we ask only what the statute means").

In any case, we do not think the passages in the legislative history to which Public Citizen refers us suggest that the Congress intended only housekeeping records to be subject to disposal under the RDA. The primary concern of the Congress was to reduce the unnecessary retention of records. Agencies were retaining too many records, not too few, and it is unsurprising that the Congress especially contemplated the disposal of many housekeeping records. *See* H.R. Rep. No. 79-361, at 1 (1945) ("The primary purpose of this bill is to prevent the United States Government from incurring large and unnecessary expenses resulting from the failure of many agencies to schedule for disposal routine 'housekeeping' records such as those relating to the hiring of personnel, procurement of supplies, and fiscal management, that are common to many or all agencies"); S. Rep. No. 79-447, at 1 (1945) (same). As the Supreme Court has observed, however, statutes "often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (holding prohibition of discrimination "because of sex" in Title VII of Civil Rights Act of 1964 applies to same-sex harassment, though that "was assuredly not the principal evil [with which] Congress was concerned").

Public Citizen also notes that in 1978, when the Congress made the Archivist's use of general records schedules binding upon agencies subject to the RDA, *see* Pub. L. No. 95-440, 92 Stat. 1063, 1063 (codified as amended at § 3303a(b)), the committee reports not only expressed concern with the

unnecessary retention of housekeeping records, but also stated that if "the records are unique to an agency, rather than simply of a general nature, they would not be affected by this bill." H.R. Rep. No. 95-1263 at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2623, 2624; S. Rep. No. 95-711 at 2 (1978). Public Citizen claims the 1978 amendment thus reaffirmed the limitation of § 3303a(d) to housekeeping records originally evinced in the 1945 committee reports, inasmuch as program records could be of a type unique to the agency that administers the particular program. As the Archivist points out, however, the amendment made the use of general records schedules mandatory by substituting a new § 3303a(b) so providing, but did not in any way change § 3303a(d). If the latter section did not mean what Public Citizen claims it meant in 1945, then it still does not because nothing in the 1978 amendment changed its meaning. Even if, however, we were to assume the statement in the 1978 reports demonstrates the committees' understanding that § 3303a(d) had been limited from the outset to housekeeping records, we would be reluctant to rely upon it; "the views of one Congress as to the meaning of an Act passed by an earlier Congress are not ordinarily of great weight." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77 n.6 (1994); *see also Republican Nat'l Comm.*, 76 F.3d at 405 (holding that where subsequent legislation merely carried over earlier provision "without substantial change, the House report is essentially post-enactment history, carrying little probative weight").

In sum, we cannot accept Public Citizen's invitation to use legislative history to supplant rather than to interpret the statute.

b. *Chevron* step two

We now proceed under step two of *Chevron* to examine whether the Archivist's interpretation "is reasonable in light of the language, legislative history, and policies of the statute." *Republican Nat'l Comm.*, 76 F.3d at 406. Public Citizen asserts that it would be irrational to construe § 3303a(d) in such a way as "to give the Archivist the power to authorize the destruction of all

records stored on a given medium or created by a given technology, without regard to the records' purposes [or] content."

This argument is based upon a misunderstanding of GRS 20 and the Archivist's rationale for adopting it. Under § 3303a(d) the Archivist must assess the "administrative, legal, research, or other value" of a record before authorizing its disposal--which is inherently a content-based judgment. As the district court reasoned, there must be "a relationship between the commonality of records covered by a general schedule and their diminished value." *Carlin I*, 2 F. Supp. 2d at 12. We agree, for if there were little or no relation between the features common to a set of records and their value, then they could not be scheduled for disposal pursuant to a general records schedule because no categorical assessment could logically be made of their value.

The district court concluded from this that the "common feature of the records scheduled under GRS 20--the fact that they have been generated by electronic technology--has no relation to each record's value." *Id.* That captures only half the matter, however. GRS 20 does not authorize disposal of electronic records *per se*; rather, such records may be discarded only after they have been copied into an agency recordkeeping system.* Therefore, GRS 20 seems to us to embody a reasoned approach to accomplishing the potentially conflicting goals of the Congress: "[j]udicious preservation and disposal of records." § 2902(5).

We note also that in a neighboring part of the RDA the Congress codified the very approach that Public Citizen claims it prohibited in § 3303a(d). Section 3303(1) requires the head of each agency to submit to the Archivist

> lists of any records in the custody of the agency that have been photographed or microphotographed under the regulations and that, as a consequence, do not appear to have

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* One might say, tracking the statute, that the records share both the "form" of being electronic and the "character" of having been duplicated and placed in an agency recordkeeping system.

> sufficient value to warrant their further preservation by the Government.

Analogously, GRS 20 authorizes disposal of electronic mail and word processing files that have been copied to a record- keeping system and, "as a consequence," *id.*, lack sufficient value to warrant their continued preservation. The technology of duplication may be different but the principle is the same. We think this provision highly persuasive in demonstrating that the Archivist's approach in GRS 20 does not reflect an unreasonable interpretation of the statute.

Public Citizen also claims that "the Archivist's unexplained departure from prior statements that general schedules are limited to administrative records ... requires that [GRS 20] be set aside." The prior statements to which Public Citizen refers, however, apparently concerned authorizations to discard the only extant version of a record, not a record that had been copied to a recordkeeping system; at the least, Public Citizen has directed our attention to no prior statement of the Archivist concerning an approach analogous to that in GRS 20. Moreover, the Archivist claims, and Public Citizen does not dispute, that GRS 23, the predecessor to GRS 20, applied to program records at the same time Public Citizen claims the Archivist's policy limited general schedules to housekeeping records. *See GRS 20*, 60 Fed. Reg. at 44,644/1 ("The GRS 23 that was approved in 1988 authorized deletion of word processing and e-mail records from [personal computers] after they had been copied to paper or microform. This authority has now been moved to GRS 20 and is extended to authorize deletion of [such records] after they have been copied to an *electronic* recordkeeping system"). When a general schedule authorizes disposal of an uncopied record, it is obvious why the Archivist would wish to exclude program records, for an error means the loss of a record; when a record is discarded pursuant to GRS 20, however, it has already been copied to the agency's recordkeeping system, and there is no risk that information will be lost to future users. We conclude, there- fore, that Public Citizen has identified no policy of the Archi- vist with which GRS

20 is inconsistent. *See Bush-Quayle '92 Primary Comm. v. FEC*, 104 F.3d 448, 454 (D.C. Cir. 1997) ("We may permit agency action to stand without elaborate explanation where distinctions between the case under review and the asserted precedent are so plain that no inconsistency appears").

In sum, we hold under *Chevron* step one that § 3303a(d) does not preclude the Archivist from including program records in a general schedule because the statutory source of his authority draws no distinction between program and housekeeping records. Under *Chevron* step two we hold that the Archivist permissibly construed the statute to allow the disposal of program records the contents of which have been preserved in a recordkeeping system. Accordingly, we uphold the Archivist's interpretation against this challenge.

2. Time specified for disposal of records

The Archivist may authorize the disposal of records under a general schedule "after the lapse of specified periods of time," if such records will not then have sufficient value to warrant their preservation. § 3303a(d). In GRS 20 he instructed agencies to delete word processing and electronic mail files after their transfer to a recordkeeping system, although word processing files may be retained until "no longer needed for updating or revision." *GRS 20*, 60 Fed. Reg. at 44,649/1.

Public Citizen argues that GRS 20 contravenes § 3303a(d) because the Archivist did not "specif[y] periods of time" in months or years for the retention of records. The Archivist responds that the statute does not require him to specify the time at which records may be discarded in months or years, and that he did specify the time for disposal of such records by reference to a condition subsequent, namely, the placement of the records in a recordkeeping system. We agree.

As to *Chevron* step one, we do not see how the phrase "specified periods of time" can be said unambiguously to require the Archivist to select a period in terms of months or years.

Whether the period to elapse before a record may be discarded is expressed rigidly in terms of months or years, or more flexibly in terms of when a record has been transferred to a recordkeeping system, a precise moment has been specified. Similarly, under *Chevron* step two, if the Archivist is to make the best determination of when records of a certain type will cease to have sufficient value to warrant their retention, then it is eminently sensible that he be able to rest that determination upon a future condition the occurrence of which will diminish the value of the records, without requiring that he predict precisely when that will occur.*

Public Citizen argues next that the Archivist's approach defeats the purpose of the RDA because the event that triggers the agency's obligation to discard a record is within the control of the agency, not that of the Archivist, and that GRS 20 thus removes the Archivist as a check upon an agency's disposal of records. This point is not well taken for, as the Archivist explains, he "has not provided an open-ended grant of authority for agencies to delete records at their leisure." Before an agency may discard electronic mail or word processing files, pursuant to GRS 20 it must first copy them to a recordkeeping system; an agency's control over the timing of that decision is irrelevant to the result that the record is preserved, and therefore that the Archivist has indeed placed a critical check upon an agency's disposal of electronic records.

We therefore uphold the Archivist's interpretation of § 3303a(d) as permitting him to base the time for disposal of

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* Although Public Citizen claims the Archivist failed to make this argument to the district court, we see that the Archivist reasoned both in his reply memorandum in support of his motion for summary judgment and in GRS 20 itself that the statute authorizes him to order disposal of records "after they have been copied to [a] recordkeeping system." GRS 20, 60 Fed. Reg. 44,649/1 (items 13 & 14); *see National R.R. Pass. Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 420 (1992) ("we defer to an interpretation which was a necessary presupposition of the [agency's] decision").

records upon their having been copied and placed in a record-keeping system.

B. Arbitrary and Capricious Challenge

Recall that under § 3303a(d) the Archivist may promulgate general records schedules authorizing the disposal of records only if he determines that "such records will not, at the end of the periods specified, have sufficient administrative, legal, research, or other value to warrant their further preservation." Public Citizen claims the Archivist made no such determination of value in GRS 20. Curiously, it then concedes he implicitly (and, Public Citizen argues, erroneously) determined that once a copy of such a record is placed in a paper or electronic recordkeeping system, the original lacks sufficient value to warrant its further preservation. We accept Public Citizen's concession that the Archivist made a determination of value, though we think it explicit rather than implicit: The Archivist explained--in a discussion entitled "Value of Electronic Records," *see GRS 20*, 60 Fed. Reg. at 44,643/3 to 44,645/2--that records located in personal computers cannot adequately be searched and are therefore "of limited use to both the originating agency and to future researchers." *Id.* at 44,645/2. The question we must now decide is whether the Archivist's determination of value is arbitrary and capricious.

We first note that Public Citizen does not contest the permissibility of discarding the electronic original of a record that has been fully copied to an electronic recordkeeping system. Instead, Public Citizen "stresse[s] that hard copy [i.e., paper] records are not satisfactory replacements for records in electronic format[, citing] the well-known advantages of electronic records for future research." *GRS 20*, 60 Fed. Reg. at 44,643/3. Our focus, therefore, is upon whether the Archivist acted arbitrarily and capriciously in determining that a paper copy in a paper recordkeeping system is an adequate substitute for the electronic original, that is, to the point that the original lacks sufficient value to warrant its continued preservation. Two considerations inform

this inquiry: (1) the superiority of electronic records for searching, manipulating, and indexing information, and (2) the completeness of the information copied to a paper recordkeeping system.

1. Superiority

Public Citizen argues the Archivist acted arbitrarily and capriciously when he authorized (and thereby required) disposal of the original electronic records after they have been printed and placed in a paper recordkeeping system; as the Archivist himself recognized, records in electronic form can be searched, manipulated, and indexed in ways that paper records cannot. *See, e.g., id.* The Archivist explained his decision on the ground that these admitted benefits accrue to any significant degree only for electronic records that are maintained in an electronic recordkeeping system:

> For records to be useful they must be accessible to all authorized staff, and must be maintained in recordkeeping systems that have the capability to group similar records and provide the necessary context to connect the record with the relevant agency function or transaction. Storage of electronic mail or word processing records on electronic information systems that do not have these attributes will not satisfy the needs of the agency or the needs of future researchers.
>
> Search capability and context would be severely limited if records are stored in disparate electronic files maintained by individuals rather than in agency-controlled recordkeeping systems. Furthermore, if electronic records are stored in electronic information systems without records management functionality, permanent records may not be readily accessible for research. Unless the records are adequately indexed, searches, even full-text searches, may fail to find all documents relevant to the subject of the query. In addition, numerous irrelevant temporary records, that would be segregable in systems with records management

> functionality, may be found. Agency records can be managed only if they are in agency recordkeeping systems.

Id. at 44,644/1-2.

Public Citizen's argument ignores this obviously material difference between the value of records that are part of an agency's centralized recordkeeping system and the value of those that are accessible only by searching a particular personal computer. We do not think the Archivist acted unreasonably in discounting the comparative value of "disparate electronic files maintained by individuals rather than in agency-controlled recordkeeping systems." *Id.*; *see also id.* at 44,646/1 ("Even accessible network word processing directories are inadequate if they are part of information systems that lack records management functionality").

Public Citizen next claims that many agencies either are now or will in the foreseeable future be capable of managing their records in electronic form on an agency-wide basis. This point, too, the Archivist addressed in promulgating GRS 20, as follows:

> Agencies must maintain their records in organized files that are designed for their operational needs. Agencies that currently have traditional paper files print their electronic mail records, word processing records, spreadsheets, and data base reports so that their files are complete, comprehensible, and in context with related records. Agency functions that have not been automated must be supported by hard copy files, even when some types of related records are generated electronically. Agencies that decide to maintain their records in electronic recordkeeping systems do so for compelling operational needs, not for future researchers. In some cases...agencies create automated indexes to hard-copy records rather than digitizing all of the records themselves. In any case, the decision must be based on an analysis of the needs of and benefits to the agency, balanced against available resources.

Id. at 44,645/1.

According to Public Citizen this explanation, which permits each agency to decide whether to retain records in electronic form or to transfer them to paper based solely upon the agency's operational needs, *i.e.*, the "administrative" value of the records, fails adequately to consider the "research" value of the records. § 3303a(d). Public Citizen also relies upon the following statement in the preamble to another final rule promulgated the same day as GRS 20, in which the Archivist set standards whereby an agency may establish a recordkeeping system for electronic mail:

> Electronic recordkeeping systems may be the best means to preserve the content, structure, and context of electronic records. In addition, an automated system may be more easily searched and manipulated than paper records. The electronic format may also allow simultaneous use by multiple staff members and may provide a more efficient method to store records. Furthermore, when they are no longer needed by the creating agency, access by future researchers to permanently valuable electronic records would be enhanced by electronic preservation.

Final Rule: Electronic Mail Systems, 60 Fed. Reg. 44,634, 44,639/1-2 (1995).

Contrary to Public Citizen, we think it plain that the Archivist adequately weighed not only the "administrative" but also the "legal, research, and other value" of records in arriving at his decision. § 3303a(d). In the Electronic Mail Systems rule upon which Public Citizen relies, the Archivist explained that "neither the standards [in that rule] nor the Federal Records Act require[s] electronic recordkeeping," 60 Fed. Reg. at 44,634/3. He conceded that electronic records will be of greater use for research if maintained in electronic recordkeeping systems and even encouraged agencies to develop those systems where practicable. But he also explained that

> the prospective interests of future researchers cannot be used to force agencies to do the impossible nor can these interests dictate to agencies how they should preserve their records for

> their own use. Agencies must create and maintain records to conduct Government business and account for their activities. Only the agency can determine what format best serves these purposes. Some agencies, or components of agencies, may determine that paper recordkeeping will continue to be adequate and cost-effective for the documentation of their transactions.

Id. at 44,638/1-2.

Public Citizen's argument that the Archivist failed to consider the research value of electronic records, therefore, reduces to the assertion that it is arbitrary and capricious for the Archivist not to require all agencies that create electronic mail or word processing records either to establish electronic recordkeeping systems immediately or to retain their electronic records until such time as they have electronic record- keeping systems. In view of the Archivist's explanations in both GRS 20 and the *Electronic Mail Systems Rule*, however, we think his decision to permit agencies to maintain their recordkeeping systems in the form most appropriate to the business of the agency is reasonable. Nor does Public Citizen claim that agencies have a legal duty to establish electronic recordkeeping systems.

We agree with Public Citizen that electronic recordkeeping has advantages over paper recordkeeping, but our duty as a reviewing court is to ask only whether the Archivist's policy choice is arbitrary or capricious; manifestly it is not. All agencies by now, we presume, use personal computers to generate electronic mail and word processing documents, but not all have taken the next step of establishing electronic recordkeeping systems in which to preserve those records. It may well be time for them to do so, but that is a question for the Congress or the Executive, not the Judiciary, to decide.

In sum, we do not think the Archivist must, under the RDA, require agencies to establish electronic recordkeeping systems. Nor do we think it unreasonable for the Archivist to permit each agency to choose, based upon its own operational needs, whether to use electronic or paper recordkeeping systems. The Archivist's

finding that electronic records are of limited use unless maintained in a recordkeeping system is reasonable as well. Consequently, we uphold his ultimate determination that a record in electronic form lacks sufficient value to warrant preservation once it is transferred intact to a paper recordkeeping system.

2. Completeness

In *Armstrong* we held that a paper printout of an electronic mail record is not an "extra cop[y]" within the meaning of § 3301 if it does not include transmission data, such as the names and addresses of both the recipient and the author and the date the message was sent--the electronic equivalents of the address, return address, and date on correspondence sent by conventional mail. *See* 1 F.3d at 1283. Public Citizen cites *Armstrong* for the proposition that electronic records often contain information that may not be transferred to paper when printed; its point is that GRS 20 is arbitrary and capricious because it does not require this information to be preserved. The Archivist responds that GRS 20 does in fact require that all such information be preserved in the agency's recordkeeping system before the electronic original may be discarded. We agree with the Archivist.

With respect to electronic mail, GRS 20 on its face addresses the concerns raised in *Armstrong* by requiring the recordkeeping system to capture all relevant transmission data. *See* 60 Fed. Reg. at 44,646/3, 44,649/1 (item 14 and Note thereto). Public Citizen identifies no information that may not be transferred when the record is copied to paper pursuant to the requirements of GRS 20.

With respect to word processing files, Public Citizen claims, based upon the capabilities of extant computer software, that there may be hidden comments or summaries that are not printed out--the electronic equivalents of a Post-it note or an abstract--the preservation of which is not required by GRS 20. *See id.* at 44,649/1 (item 13). Although the Archivist claims in his brief that GRS 20, properly interpreted, does require the preservation of such hidden items in word processing records, he did not make

that point express in promulgating GRS 20. The Archivist explains that GRS 20 requires retention of all such information, for the preamble to the schedule requires that a recordkeeping system "preserve[ ] the[ ] content, structure, and context" of a record. *Id.* at 44,644/1. In other words, as counsel for the Archivist put it at oral argument, if the information is part of a record under the RDA, *see* § 3301, then it must be preserved. Thus, the Archivist claims that GRS 20 says precisely what Public Citizen thinks it should but does not say.

The Archivist's interpretation of his own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997). That standard is easily met here. We also note that the Archivist's interpretation is consonant with the requirement in GRS 20 that a word processing file be "copied" to a recordkeeping system. 60 Fed. Reg. at 44,649/1 (item 13); *see Armstrong*, 1 F.3d at 1283 (explaining that "unless the paper versions include all significant material contained in the electronic records ... the two documents cannot accurately be termed 'copies'"). That the Archivist's interpretation comes for the first time in litigation does not make it unworthy of deference, as "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462. Considering the substance of that interpretation, we trust that Public Citizen is not aggrieved by this indulgence.

Lastly, Public Citizen complains that the Archivist improperly relies upon the preamble in his interpretation of the general schedule. We regularly rely upon the preamble in interpreting an agency rule. *See National Mining Ass'n v. EPA*, 59 F.3d 1351, 1355 n.7 (D.C. Cir. 1995). The purpose of the preamble, after all, is to explain what follows. *See* 5 U.S.C. § 553(c) ("After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose").

In sum, we reject Public Citizen's claim that GRS 20 fails to require that all relevant information be transferred to a paper

recordkeeping system before an electronic original may be discarded.

III. Conclusion

For the foregoing reasons, we uphold GRS 20. We therefore need not decide whether the Executive Office of the President is a proper party to an action brought under the RDA, nor whether the district court had the power to enter an injunction ordering the Archivist to comply with its declaratory judgment holding the schedule invalid. Accordingly, the judgment of the district court is

Reversed.

FILED Oct 22, 1997
Clerk. U.S. District Court,
District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 96-2840 (PLF)

PUBLIC CITIZEN, et al.,
Plaintiffs,

v.

JOHN CARLIN, in his official capacity
as Archivist of the United States,
Defendants

OPINION

This case involves a challenge to General Records Schedule ("GRS") 20, promulgated by the Archivist of the United States in 1995. Plaintiff assert that GRS 20 -- a regulation governing the disposal of electronic records created by agencies of the federal government -- is arbitrary and capricious, irrational and contrary to law. Currently before the Court are defendants' motion to dismiss and the parties' cross-motion for summary judgment. Upon consideration of the papers submitted, the arguments of counsel, the entire record and the applicable law, the Court concludes that in promulgating GRS 20 the Archivist exceeded his authority under Section 3303a(d) of the Records Disposal Act, 44 U.S.C. § 3301 *et seq*. The Court therefore grants plaintiffs' motion for summary judgment and denies defendants' motions to dismiss and for summary judgment.

I. BACKGROUND

In 1993, the United States Court of Appeals for this Circuit in *Armstrong v. Executive Office of the President* ("*Armstrong*

II"), 1 F.3d 1274, 1287 (D.C. Cir. 1993), held that electronic versions of documents are records that must be created, managed and disposed under the rules set forth in the Federal Records Act, 44 U.S.C. §§ 2101 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, and 3301 *et seq.* This holding left undisturbed the "agencies' ability to purge incidental electronic records from their files by acting, *with the Archivist's approval*, to dispose of those documents that lack 'sufficient administrative, legal, research, or other value to warrant their continued preservation.' *Armstrong II*, 1 F.3d at 1287 (emphasis in original).

In 1972, the Archivist began authorizing disposal of electronic records through general schedules in very limited circumstances. In October, 1994, the Acting Archivist proposed revisions to GRS 20 to explicitly authorize all federal agencies to destroy agency records stored on word processing and electronic mail systems, as well as other electronic records, once the records have been printed in "hard copy" on paper or microform, and if the agency determines that it no longer needs the electronic version. *See* Notice of Proposed Records Schedule; Request for Comments, 59 Fed. Reg. 52,313 (1994) (included in Admin. Rec., Vol. I at 89-92) .[1]

On August 14, 1995, the Archivist issued the present version of GRS 20. *See* Notice of Issuance of General Records Schedule, 60 Fed. Reg. 44,643 (1995).[2] GRS 20 authorizes the disposal of electronic records in fifteen enumerated categories, including electronic records created by computer operators, programmers, analysts, systems administrators and government staff using office automation applications. Specifically, GRS 20, Item 13 provides that word processing files recorded on electronic media, "after they have been copied to an electronic recordkeeping system,

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[1] Thirty-seven comments were received in response to the proposal. *See* Admin. Rec., Vol. I at 61-62 (Forum for the Discussion of Proposed Changes to General Records Schedule 20).

[2] Admin. Rec., Vol. I at 2 (Request for Records Disposition Authority).

paper, or microform for recordkeeping purposes," may be deleted from the word processing system "when no longer needed for updating or revision." Notice of Issuance of General Records Schedule, 60 Fed. Reg. at 44,649. GRS 20, Item 14, covering electronic mail records, provides that senders' and recipients' versions of electronic mail messages and attachments thereto may be deleted from the electronic mail system after they have been copied to an electronic recordkeeping system, paper or microform for recordkeeping purposes. *Id.*[3]

The government argues that (1) plaintiffs lack standing to bring this action; (2) the second count in plaintiffs' complaint - relating to the Office of the United States Trade Representative ("USTR") -- is moot; and (3) the Executive Office of the President ("EOP") is not a proper party and should be dismissed from this action. In addition, the government maintains that it is entitled to summary judgment because the promulgation of GRS 20 did not violate the Administrative Procedure Act, while plaintiffs argue that the promulgation of GRS 20 was arbitrary and capricious, irrational and contrary to law.

II. STATUTORY FRAMEWORK

The records creation, management and disposal duties of federal agencies are set out in a collection of statutes known collectively as the Federal Records Act (the "FRA"), 44 U.S.C. §§ 2101 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, and 3301 *et seq.*, The FRA is intended to assure, among other things, "[a]ccurate and complete documentation of the policies and transactions of the Federal Government," "[c]ontrol of the quantity and quality of

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[3] The 1995 revisions to GRS 20 removed certain items from GRS 23 and placed the authority for disposing of those items under GRS 20. Pursuant to this change, disposition authority for records created on word processing and electronic mail systems was moved from GRS 23, Item 2, to its current place in GRS 20, Items 13 and 14.

records produced by the Federal Government," and "[J]udicious preservation and disposal of records." 44 U.S.C. § 2902.[4]

The FRA prescribes the exclusive mechanism for disposal of federal records: no records may be "alienated or destroyed" except in accordance with the FRA's provisions. *See* 44 U.S.C. § 3314. If a document qualifies as a record, the FRA prohibits an agency from "discarding it by fiat." *Armstrong II*, 1 F.3d at 1278 (citing *American Friends Serv. Comm. v. Webster*, 720 F.2d 29, 62 (D.C. Cir. 1983) ("Congress did not intend to grant [the agency] a blank check for records disposal.")). Rather, the Records Disposal Act (the "RDA"), 44 U.S.C. § 3301 *et seq.*, -- a component of the FRA -- requires the agency to procure the approval of the Archivist before disposing of any record. *See* 44 U.S.C. § 3303a. In evaluating records for preservation, the agency is to focus on whether the records have any administrative, legal or fiscal use to the agency, *see* Admin. Rec., Vol. VI at 2316-20 (National Archives and Records Administration ("NARA"), Records Management Handbook: Disposition of Federal Records (1992)), while the Archivist and his staff focus on whether the records have sufficient historic or research value to those outside the agency to warrant their preservation. *Id.* at 2319-20. If the Archivist determines that agency records do not hold administrative, legal, research or other value, he can authorize disposal of the records. 44 U.S.C. § 3303a(a), (d) and (e).

Under the system of individual agency schedules, an agency submits to the Archivist a "request for disposition authority" or a "disposition schedule" in which the agency identifies specific agency records and proposes that they be destroyed after the lapse of specified periods of time. 44 U.S.C. § 3303a(a); Scheduling Temporary Records, 36 C.F.R. § 1228.30 (1997). The Archivist

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[4] *See Armstrong II*, 1 F.3d at 1278 (*quoting* 44 U.S.C. § 2902 (1), (2) and (5)); *see also Armstrong v. Bush* ("*Armstrong I*"), 924 F.2d 282, 292 (D.C. Cir. 1991) (the FRA is intended to guarantee that agencies' records management programs "strike a balance 'between developing efficient and effective records management, and the substantive need for Federal records'")

then must issue a notice requesting public comment on the agency's proposal, and the Archivist's staff must assess the value of the records. The Archivist may accept or reject the agency's proposal. 44 U.S.C § 3303a(a). If the Archivist finds that the records have sufficient value, the records eventually will be transferred to the Archives as "permanent" records. 44 U.S.C. § 2107. Otherwise, the Archivist will approve a schedule authorizing disposition of the records after they have been retained for an appropriate period of time. 44 U.S.C. § 3303a(a).[5]

As an alternative to individual agency schedules, Congress has authorized the Archivist to promulgate General Records Schedules governing the disposition of certain kinds of records only records of a "specified form or character common to several or all agencies" that do not, "after a specified period of time" have sufficient administrative, legal, research or other value to warrant their continued preservation. 44 U.S.C. § 3303a(d).[6] The General Records Schedules "cover records documenting administrative, or housekeeping, functions rather than program functions." Admin.

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[5] 44 U.S.C. § 3303a(a) states in full:

The Archivist shall examine the lists and schedules submitted to him under section 3303 of this title. If the Archivist determines that any of the records listed in a list or schedule submitted to him do not, or will not after the lapse of the period specified, have sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government, he may, after publication of notice in the Federal Register and an opportunity for interested persons to submit comment thereon --

(1) notify the agency to that effect; and

(2) empower the agency to dispose of those records in accordance with regulations promulgated under section 3302 of this title.

[6] 44 U.S.C. § 3303a(d) states in full:

The Archivist shall promulgate schedules authorizing the disposal, after the lapse of specified periods of time, of records of a specified form or character common to several or all agencies if such records will not, at the end of the periods specified, have sufficient administrative, legal, research, or other value to warrant their further preservation by the United States Government. A Federal agency may request changes in such schedules for its records pursuant to section 2909 of this title.

Rec., Vol.IV. at 2324 (NARA, Records Management Handbook: Disposition of Federal Records). To date, the Archivist has issued twenty-three General Records Schedules, covering the disposal of approximately one-third of the total volume of records created by federal agencies. Admin. Rec., Vol. III at 857 (Introduction to General Records Schedules, NARA Transmittal No.7, August 1995).

In addition to his statutory responsibility to judge the suitability of records for disposal, under the FRA the Archivist must also (1) "provide guidance and assistance to Federal agencies with respect to ensuring adequate and proper documentation of the policies and transactions of the Federal Government and ensuring proper records disposition," 44 U.S.C. § 2904(a); (2) "promulgate standards, procedures, and guidelines with respect to records management," 44 U.S.C. §' 2904(c)(l); and (3) "conduct inspections or surveys of the records and the records management programs within and between Federal agencies." 44 U.S.C. § 2904(c)(7).

The Archivist plays "a key role" in the FRA's enforcement scheme. *Armstrong II*, I F.3d at 1279. If he discovers that an FRA provision has been or is being breached, the Archivist must (1) inform the agency head of the violation and suggest corrections, and (2) if ameliorative measures are not undertaken by the agency within a reasonable time, submit a written report to Congress and the President. 44 U.S.C. § 2115(b). In addition, if the Archivist discovers any "actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of [an] agency, he must notify the agency head and assist him or her in initiating an action through the Attorney General for the recovery of wrongfully removed records or for other legal redress. 44 U.S.C. § 2905(a); *see also* 44 U.S.C. § 3106 (requiring agency heads to notify the Archivist of any unlawful destruction or removal of records and placing upon them an independent duty to seek legal action through the Attorney General to recover the records). If the agency head is recalcitrant in pursuing legal remedies, the Archivist himself is to (1) request the Attorney

General to initiate action and (2) inform Congress that he has made that request. 44 U.S.C. § 2905(a). *See Armstrong II*, 1 F.3d at 1279 (citing 44 U.S.C. § 2905(a)); *see also Armstrong I*, 924 F.2d at 295 ("if the agency head or Archivist does nothing while an agency official destroys or removes records in contravention of agency guidelines and directives, private litigants may bring suit to require the agency head and Archivist to fulfill their statutory duty to notify Congress and ask the Attorney General to initiate legal action").

III. DEFENDANTS' MOTION TO DISMISS

A. Plaintiffs Have Standing

Article III standing requires that a plaintiff have suffered (1) an "injury in fact -- an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical" -- (2) which is "fairly traceable" to the challenged act, and (3) is "likely" to be "redressed by a favorable decision." *National Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61(1992)). These requirements apply to individual plaintiffs, as well as to organizations asserting standing to sue either on their own behalf or on behalf of their members. *Havens Realty v. Coleman*, 455 U.S. 363, 378 (1982).[7]

1. *Injury-in-fact*

Plaintiffs in this case are historians, researchers and journalists who conduct research using government records made

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[7] The government concedes that if plaintiffs have Article III standing prior precedent in this Circuit acknowledges that individuals and organizations in plaintiffs' position are within the "zone of interests" of the FRA and thus have met prudential standing requirements. Defs.' Mem. of Pts. & Authorities at 16 n. 16.

available under the Freedom of Information Act, 5 U.S.C. § 552,[8] or in the collections of the National Archives and Records Administration; and libraries that provide the public with access to electronic records of the government.

The government claims that plaintiffs have not met the first prong of the standing test -- injury-in-fact-- because their interest in this case is "ideological and abstract." Because plaintiffs have not pointed to specific documents that will be unavailable to them as a result of GRS 20's implementation and have not sued to challenge outright destruction of particular records, the government argues that plaintiffs' alleged injuries are not concrete enough to constitute injury-in-fact. *See* Defs.' Mem. at 10-16.

The Court disagrees. The record contains ample evidence that the individual plaintiffs and members of the plaintiff organizations have been or will be directly harmed by the promulgation of GRS 20. For example, plaintiffs assert that specific research projects, for which plaintiff Scott Armstrong has made FOIA requests for electronic versions of government records, will be affected directly by GRS 20.[9] Mr. Armstrong is an author and journalist who has made numerous requests under the FOIA for government records in electronic form and, according to him, is a person who has reason to make future requests for such records for research projects on topics including U.S. national security policy from 1978 to the present; Saudi-U.S. relations; Cuba-U.S. relations; Middle East arms sales; U.S. nuclear posture and nuclear arms control; the Native Hawaiian Sovereignty Movement; and labor rights and anti corruption efforts. Declaration of Scott Armstrong at ¶ 5 ("Armstrong Decl."). Mr. Armstrong points to specific Cabinet departments and components of the Executive Office of the President that have

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[8] Amended by the Electronic FOIA Amendments of 1996, P.L. 104-231, § 5, 104 Stat. 2422 (1996).

[9] *See* Pls. Reply Mem. in Support of Pls.' Cross-Mot. for Summ. J. ("Pls.' Reply") at 34.

adopted the "print and delete" method of preserving e-mail and word processing records in accordance with GRS 20 and whose electronic records he has requested in the past and plans to request in the future. Armstrong Decl. ¶¶ 4-8. He further states that destruction of electronic versions of documents makes it more difficult to retrieve and manipulate documents he seeks under the FOIA. *Id* ¶ 8.

The injuries to Mr. Armstrong's interests as researcher, author and journalist are concrete enough to constitute injury-in-fact. *See American Friends Serv. Comm. v. Webster*, 720 F.2d at 46 (plaintiffs who had claimed a need for agency documents arising "'out of their professions as historians, journalists, teachers, film writers, or attorneys'" had standing to challenge the Archivist's approval of individual agency disposition schedules where they had made past FOIA requests, had other requests pending and intended to request records from the agency in the future); *see also Competitive Enterprise Institute v NHTSA*, 901 F.2d 107 (D.C. Cir. 1990) (consumer group sufficiently demonstrated injury-in-fact by showing that federal agency's decision to reduce automobile fuel economy standards hampered consumer group's members' ability to purchase larger passenger vehicles).

Plaintiffs Scott Armstrong, Eddie Becker, the National Security Archive, Public Citizen and members of the Organization of American Historians have made FOIA requests for electronic documents in the past and intend to request records in electronic form in the future.[10] They have demonstrated through their declarations that they face a real risk that records will not be available to them in electronic form because of the implementation of GRS 20, even though the 1996 amendments to the FOIA

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[10] Armstrong Decl. ¶ 5; Declaration of Eddie Becker at ¶ 2; Declaration of Thomas S. Blanton, Director of the National Security Archive, at ¶ 4; Declaration of Christopher McGinn, Deputy Director of Public Citizen's Global Trade Watch, at ¶ 4; Declaration of Philip L. Cantelon, member of the Organization of American Historians, at ¶ 4.

specifically allow the plaintiffs to request records in electronic form. *See* 5 U.S.C. § 552(a)(4) (as amended by the Electronic FOIA Amendments of 1996, P.L. 104-231, § 5, 104 Stat. 2422 (1996)).[11] The Court concludes that the plaintiff historians, researchers, journalists and authors have sufficiently pled injury-in-fact. *See American Friends Serv Comm. v Webster*, 720 F.2d at 46.

The Court also finds that plaintiffs have sufficiently pled injury-in-fact to the members of the American Library Association ("ALA"), which will be directly and dramatically affected by the compliance of federal agencies with GRS 20.[12] Many member libraries provide access to government records by (1) serving as depositories for government publications under the Government Printing Office's ("GPO") Federal Depository Library Program; (2) providing on-line access to government records; and (3) providing access to private collections, books, periodicals or other publications that contain government records. Declaration of Elizabeth Martinez, Executive Director of the ALA, at ¶ 7 ("Martinez Decl."). Many Federal Depository Libraries provide public users with computer work stations that are able to access government information via the World Wide Web, and the GPO has opened 41 gateways in Depository Libraries to give the public access to many federal documents via an Internet connection. *Id.* ¶ 8-9. Some ALA members are also responsible for establishing archives of government records in electronic form, which the libraries then make available to the public on-line. *Id.* ¶ 10. The Martinez declaration demonstrates that many institutions and individuals will suffer distinct and palpable injury if government agencies are permitted to destroy pursuant to GRS 20 electronic

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[11] *See. E.g.* Blanton Decl. ¶¶ 10-12, 14-15, 17-18; McGinn Decl. §§ 4-8.

[12] Although the Court finds injury-in-fact as to several plaintiffs, standing need only be established as to one in order for the case to go forward. *Railway Labor Exec. Ass'n v United States*, 987 F.2d 806, 810 (D.C. Cir. 1993).

versions of documents that have been preserved in paper or microfiche recordkeeping systems.

2. Redressability and Causation

The government next asserts that striking down GRS 20 will not ensure that electronic versions of these records will be preserved in an electronic format, since agencies may destroy the electronic versions anyway under individual agency disposition schedules. Thus, it argues that a favorable ruling from this Court will not necessarily or even likely redress the injuries plaintiffs assert. *See* Defs.' Mem. at 16-17.[13]

It is important to recognize that plaintiffs are not challenging the destruction of electronic records *per se*. Plaintiffs acknowledge that if GRS 20 is struck down, the Archivist may still approve individual agency schedules authorizing the destruction of electronic mail and word processing records; they concede that destruction of some electronic records certainly will be necessary and practical.[14] Plaintiffs only challenge the use of a General Record Schedule to schedule the destruction of electronic records, without distinguishing valuable electronic records from useless ones. Thus, it is likely that a decision striking down GRS 20 would, in fact, fully address the plaintiffs' alleged injury. *See Akins v. Federal Election Commission*, 101 F.3d 731, 738 (D.C. Cir. 1990) (*en banc)* (so long as error was one upon which challenged agency decision rests, injury to plaintiff is redressable by court, notwithstanding that agency might well "subsequently legitimately decide to reach the same result through different

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[13] The causation and redressability requirements of Article III "tend to merge" in a case like this where "the requested relief consists solely of the reversal or discontinuation of the challenged action." *See Branton v. FCC*, 993 F.2d 906, 910 (D.C. Cir. 1993).

[14] See Pls.' Mem. in Opp. to Defs.' Mot. To Dismiss or For Summ. J. and in Support of Pls.' Cross-Mot. for Summ J. ("Pls. Mem.") at 18.

reasoning"). The Court therefore concludes that plaintiffs have standing.[15]

B. Plaintiffs' Claim Against The USTR Is Not Moot

Plaintiffs' second claim for relief involves the disposal of word processing records created by the Office of the United States Trade Representative ("USTR") from 1986 to 1992 and stored on backup tapes preserved pursuant to an injunction issued in *Armstrong II*. Compl. ¶¶ 65-68. Shortly after the complaint in this action was filed, the USTR received authority to withdraw a schedule under which the word processing records at issue would be destroyed.[16] The government asserts that the withdrawal of the schedule has rendered moot plaintiffs' second claim -- a challenge to the USTR's right to destroy the enjoined documents pursuant to GRS 20. Defs.' Mem. at 41-43.

The Court is not convinced that there is no risk that the USTR documents at issue will be destroyed pursuant to GRS 20. First, the USTR still maintains that GRS 20 was properly propounded and will be upheld, Letter from General Counsel Jennifer Hiliman to Archivist John Carlin (Defs.' Mem., Exh. A),

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[15] *Branton v. FCC*, 993 F.2d 906, on which the government relies, is not persuasive authority to the contrary in the context of this case. The plaintiff in *Branton* could not meet the redressability standard because the relief he sought required third party radio stations over whom the court had no jurisdiction to stop broadcasting indecent material. *Id.* at 911-12. Branton failed to establish "some reason to believe that the level of broadcast indecency [by the non-party radio stations is significantly affected by the possibility of incurring an FCC sanction," and it therefore was mere speculation that plaintiff's harm would be redressed by court action against the FCC. *Id.* at 912. Here, by contrast, plaintiffs' injury stems from the fact that agencies are required to follow GRS-20; a ruling by this Court that GRS-20 is invalid would necessarily bind the agencies and would therefore redress plaintiffs' harm.

[16] *See* Letter from General Counsel Jennifer Hillman to Archivist John Carlin (Jan. 14, 1997) (Defs.' Mem., Exh. A); Letter from Archivist John Carlin to USTR Charlene Barshefsky (Jan.15, 1997) (Defs.' Mem., Exh. B).

at which time it would be free to renew its plans to destroy the records based on GRS 20. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (holding that case is not moot when defendant voluntarily halts challenged practice but is free to resume conduct in future); *City of New York v. Baker*, 878 F.2d 507, 511-12 (D.C. Cir. 1989). Second, General Records Schedules are mandatory, 44 U.S.C. § 3303a(b), and the USTR and other agencies are required to destroy records in accordance with the GRS 20 unless they submit a request for and receive an exception to the Schedule. General Records Schedules, Applicability, 36 C.F.R. § 1228.42(a) (1997). Because the USTR has made no such request for an exception, it is quite possible that the USTR may destroy documents pursuant to GRS 20 at some point in the future future. Plaintiffs' second claim therefore is not moot.

C. The EOP Is A Proper Party To This Lawsuit

The government argues that the Executive Office of the President is not a proper patty to this lawsuit because it has no independent existence or functions, apart from those of its separate component parts. Rather, it maintains, the EOP functions simply as an "umbrella" designation for various separately designated components which operate in close proximity to the President. The government fears that having the EOP as a party may subject governmental entities not named in the complaint and not governed by the FRA to any injunctive relief ordered by the Court in this case. *See* Defs.' Mem at 43-45.

The Court is unpersuaded by the government's argument. Because no individual record can be subject to both the FRA and the Presidential] Records Act ("PRA"),[17] and because the PRA specifies that its coverage and the coverage of the FOIA are

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[17] 44 U.S.C. §§ 2201-07; *see Armstrong II*, 1 F.3d at 1293

mutually exclusive,[18] the court of appeals for this Circuit has recognized that the FRA and the FOIA apply to the same set of records. *See Armstrong II* 1 F 3d at i293 (concluding that the set of records subject to the FOIA and the FRA and those subject to the PRA are mutually exclusive). As Judge Tatel later explained, the court of appeals has treated the term "agency" in the FRA as coterminous with the definition of "agency" in the FOIA because of the close relationship between the two statutes. *Armstrong v. Executive Office of the President* ("*Armstrong III*"), 90 F.3d 553, 567 (D.C. Cir. 1996) (Tatel, J., dissenting). Thus, the Court looks to the FOIA to determine whether a governmental entity is an agency under the FRA.

Section 552(f) of the FOIA provides that the term "agency" includes

> any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (*including the Executive Office of the President*), or any independent regulatory agency.

5 U.S.C. § 552(f) (emphasis added). Since the Executive Office of the President is an agency for the purposes of the FOIA, it follows under *Armstrong II* that the EOP is an agency for purposes of the FRA as well.

The EOP's status as an agency is also evidenced by the authority it possesses to impose requirements on all of the EOP components in certain matters. Most significantly, the preparation of records disposition schedules is not handled separately by EOP components, but is centralized in the EOP.[19] While the

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[18] See 44 U.S.C. § 2201(2)(B).

[19] *See* EOP, Records Management Program, Federal Records Creation, Maintenance, and Disposition Manual, Pls.' Mem., App. at P316-17; *Armstrong II*, CA No.89-142, Dep. of Mary Hester Anton, Dir. of Library and Information Services, Office of Administration, Executive Office of the President, January 8, 1992 (Pls.' Mem., App. at 282-99).

government may be correct in its assertion that the Office of Administration administers records disposition schedules on behalf of the EOP agency components, it is clear from the EOP's records schedules that the administration of records is handled by and on behalf of the EOP as a single entity, Records schedules identify the EOP as an agency and are signed by an Office of Administration official with the title of "EOP Records Management Officer. " *See, e.g.*, Request for Records Disposition Authority, Pls.' Mem., App. at P238. The EOP therefore is a proper party to this lawsuit.

Maintaining the EOP as a defendant in this litigation will not affect components of the EOP that are not governed by the FRA. The term "agency" under the FOIA and the FRA "is not interpreted as including the President's immediate staff or units in the [EOP] whose sole function is to advise and assist the President." H.R. Rep. No. 95-1487, at 11 (1978) (*quoted in Armstrong II*, 1 I.3d at 1295); *see Armstrong III*, 90 F.3d at 567-68 (Tatel, J., dissenting). It should be clear to those components traditionally governed by the PRA therefore that they are not implicated in this action, which involves a General Records Schedule promulgated pursuant to the FRA.

IV. THE CROSS-MOTIONS FOR SUMMARY JUDGMENT

A. Standard of Review

The Supreme Court has held that the Federal Records Act and the Records Disposal Act do not confer a private right of action to sue directly under those statutes to prevent the destruction or removal of records. *Kissinger v Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 149 (1980). While judicial review is precluded to the extent that allegations are made

that agency officials are not acting in compliance with their duties under recordkeeping guidelines, the Court has a role to play in reviewing the guidelines themselves under the APA. *See American Friends Serv. Comm. v. Webster*, 720 F.2d at 59; *cf.. Armstrong I*, 924 F.2d at 291, 294-95. Under the APA, the Court may set aside GRS-20 in this case only if it is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2). That analysis requires a court to address two separate questions: (1) whether the Archivist "properly interpreted [his] statutory responsibilities - whether [his] actions were 'in accordance with the law,'" and (2) whether the agency actions taken under the statutory authority are 'arbitrary and capricious.'" *See American Friends Serv. Comm. v. Webster*, 720 F.2d at 59 (*quoting* 5 U.S.C. § 706(2)(A)). In this case, the Court concludes that in promulgating GRS 20 the Archivist did not properly interpret his responsibilities under the FRA[20]

B. The Archivist Exceeded the Scope of His Statutory Authority in Promulgating GRS-20

Section 3303a(d) of the Records Disposal Act permits the Archivist to promulgate general schedules "authorizing the disposal, [1] after a lapse of specified periods of time, [2] of records of a specified form or character common to several or all agencies [3] if such records will not, at the end of the periods specified, have sufficient administrative, legal, research, or other value to warrant their preservation by the United States Government." 44 U.S.C. § 3303a(d).

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[20] Review under the APA generally is limited to the administrative record presented by the agency to the reviewing court. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). In this case, however, the Court has allowed the administrative record to be supplemented to a limited extent. *See* Order (July 3, 1997) (citing *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm.*, 751 F.2d 1287, 1327 (D.C. Cir. 1984), *vacated in part* 760 F.2d 1320 (1985), *aff'd*, 789 F.2d 26 (D.C. Cir., *cert. denied*, 479 U.S. 923 (1986)).

The Court concludes that in promulgating GRS 20 the Archivist exceeded his authority under Section 3303a(d) of the Records Disposal Act in at least three respects. First, in promulgating GRS 20 he has allowed for the destruction of "program" records of federal government agencies through the use of a General Records Schedule, an action which exceeds the limits Congress placed on the use of general schedules when it enacted Section 3303a(d).

Second, the Archivist has abdicated to the various departments and agencies of the federal government his statutory responsibility under the Records Disposal Act to insure that records with administrative, legal, research or other value are preserved by federal agencies. Third, in promulgating GRS 20 he violated the Records Disposal Act by failing to identify a specified period of time for retention for the records scheduled.

1. The Records Disposal Act Does Not Authorize Destruction of "Program" Records through a General Records Schedule

   a. Congress intended General Records Schedules to cover administrative, not program records[21]

Congress first authorized the use of General Records Schedules as a method of disposing of federal records in 1943. The statute enacted then provided:

> The head of each agency of the United States Government shall submit to the Archivist of the United States . . . schedules proposing the disposal after the lapse of specified periods of time of records of a specified form or character that either have accumulated in the custody of the agency or that may accumulate therein at any time after the submission

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[21] In contrast to the "housekeeping" or "facilitative" character of administrative records, "program records," as defined by the National Archives and Records Administration ("NARA"), are "[r]ecords created or received and maintained by an agency in the conduct of the substantive functions for which it is responsible." Admin. Rec., Vol. VI at 2403, 2413 (NARA, Records Management Handbook: Disposition of Federal Records, App. D., Glossary).

> of such schedules and that apparently will not after the lapse of the period specified have sufficient administrative, legal, research, or other value to warrant their further preservation by the Government.

Disposal of Certain Government Records, ch. 192, sec. 3 57 Stat. 381(1943). The statute was amended in 1945 specifically to transfer the authority to promulgate General Records Schedules from the heads of the individual agencies to the Archivist and to require that the records be of a form or character common to several or all agencies. Pub. L. 79-133, 59 Stat. 434 (1945). Today, the statute still requires that General Records Schedules be limited to records "of a specified form or character common to several or all agencies" and that the Archivist him or herself promulgate the General Records Schedules. 44 U.S.C. § 3303a(d).

The RDA itself does not provide a definition for the term "records of a specified form or character common to several or all agencies." The Court therefore must look beyond the language of the statute to determine what records Congress intended be covered by General Records Schedules. The RDA's legislative history shows that both houses of Congress contemplated that General Records Schedules would be used only for "routine 'housekeeping records,' such as those relating to the hiring of personnel, procurement of supplies, and fiscal management, that are common to many agencies." H.R. Rep. No.79-361 at 1(1945); 5. Rep. No.79447 at 1(1945). When Congress amended Section 3303a(d) in 1978 to make the use of General Records Schedules mandatory, the Committee on House Administration assured Congress that "[i)f records are unique to an agency they would not be affected by" the mandatory General Records Schedules. H. R. Rep. No. 95-1263 at 1-2, *reprinted in* 1978 U.S.C.C.A.N 2623, 2624. The Committee also reaffirmed that General Records Schedules were to cover the "disposal of routine agency records in such areas as personnel, payroll, procurement and supply.', *Id* at 1.

Following Congress' directive, the National Archives and Records Administration and its predecessor, the General Services

Administration ("GSA"), consistently have instructed federal agencies to use General Records Schedules for "administrative" records, not for "program" records. *See, e.g.*, Admin. Rec., Vol. IV. at 2324 (NARA, Records Management Handbook: Disposition of Federal Records (1992)); NARA, Records Management Handbook: Disposition of Federal Records 28 (1981) (Pls' Mem., App.); NARA, Records Management Handbook: Disposition of Federal Records 26 (1978) (Pls.' Mem., App.). As the current NARA Records Management Handbook notes, "[t]he GRS covers records documenting administrative, or housekeeping functions rather than program functions.,, Admin. Rec., Vol. VI at 2324 (NARA, Records Management Handbook: Disposition of Federal Records). Other NARA documents state that General Records Schedules should not be used for administrative records that are "mixed with program records.', Admin. Rec., Vol.111 at 857 (Introduction to General Records Schedules, NARA Transmittal No.7, August 1995).[22] If mixed administrative and program records cannot be "economically segregated the entire file should be kept for the period of time approved for the program records. *Id.*

Given the legislative history of Section 3303a(d) regarding the scope of General Records Schedules, it is not surprising that every general records schedule promulgated to date, except GRS 20, covers administrative housekeeping records common to all agencies.[23] Even the few general schedules that on their face seem

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[22] *See also* Pls.' Mem., App. at P60 (1ntroduction to General Records Schedules, June 1988); Pls.' Mem., App. at P62 (1ntroduction to General Records Schedules, NARA Transmittal No.2, October 30 1989).

[23] Records covered by the GRS series include the following: civilian personnel records (GRS 1); payrolling and pay administration records (GRS 2); procurement, supply and grant records (GRS 3); property disposal records (GRS 4); budget preparation, presentation and apportionment records (GRS 5); accountable officers' accounts records (GRS 6) and expenditure accounting records (GRS 7); stores, plant and cost accounting records (GRS 8); travel and transportation records (GRS 9); motor vehicle maintenance and operations records (GRS 10); space and

to cover both housekeeping and program records are careful to exclude program records from their scope. For example, GRS 17, which schedules the disposal of cartographic, aerial photographic, architectural and engineering records, and GRS 21, covering audiovisual records, specifically provide that separate NARA guidelines for managing the categories of records covered by the two schedules must be used in conjunction with GRS 17 and GRS 21 to insure proper disposition of all such records. Admin. Rec., Vol.III at 963, 990 (1ntroductions to GRS 17 and 21). GRS 18, covering security and protective services records, excludes from its authority records documenting government wide or agency wide security and protective services planning and programming that reflect overall policies and determinations. Admin. Rec., Vol.III at 967 (Introduction to GRS 18). GRS 19 was rescinded after NARA concluded that research and development records should not be governed by a GRS, due to their varied nature. Admin. Rec., Vol.III at 980 (GRS 19).

The government nevertheless asserts that Congress did not intend to limit General Records Schedules to records documenting housekeeping functions and argues that the term specified form or character" in Section 3303a(d) should be construed more broadly to include records of a common medium. The government maintains that the term "form or character" in Section 3303a(d) was intended to be read in the same way as the term "form or characteristic" found in Section 3301. In Section 3301, Congress defined a federal record as not being limited by "physical *form or*

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maintenance records (GRS 11); communications records (GRS 12); printing, binding, duplication and distribution records (GRS 13); information services records (GRS 14); housing records (GRS 15); administrative management records (GRS 16); cartographic, aerial photographic, architectural, and engineering records (GRS 17); security and protective services records (GRS 18); electronic records (GRS 20); audiovisual records (GRS 21); inspector general records (GRS 22); and "records common to most offices within agencies" (GRS 23). GRS 19, covering research and development records, was rescinded. Admin. Rec., Vol. III at 859-1001 (General Records Schedules 1-23, NARA Transmittal No.7, August 1995).

characteristic," 44 U.S.C. § 3301 (emphasis added), and NARA has sought to clarify the definition of the term "federal record" by stating that "the medium [of a record] may be paper, film, disk, or other physical type or form; and that the method of recording may be manual, mechanical, photographic, *electronic* or any other combination of these or other technologies," 36 C.F.R. § 1222.12(b)(2) (1997) (emphasis added). The government infers from Section 3301 and NARA's regulation that "form or characteristic" in Section 3301, and, in turn, "form or character" in Section 3303a(d) can refer to the medium of a record. Under the government's theory, it follows that all records created on electronic media, such as electronic communication or word processing systems, are "records of a specified form or character common to several or all agencies," and thus may be scheduled pursuant to Section 3303a(d). *See* Defs.' Mem. at 22-23.

The government's interpretation of Section 3303a(d) not only contradicts the clear intent of Congress, but is irrational on its face. The general schedules were designed to handle records that document housekeeping functions, procedures and transactions, such as personnel, maintenance or procurement, not unique aspects of a given agency. The routine nature of these kinds of records makes them both of a character common to multiple agencies, and also of lesser value. *See* NARA, Records Management Handbook: Disposition of Federal Records 28 (1981) (Pls.' Mem., App.) ("General records schedules are based upon the following premises: . . . . The records have the same values, regardless of the agency that creates them."); NARA, Records Management Handbook: Disposition of Federal Records 26 (1978) (Pls.' Mem., App.) (same). Thus, there is a relationship between the commonality of records covered by a general schedule and their diminished value.

The common feature of the records scheduled under GRS 20 -- the fact that they have been generated by electronic technology -- has no relation to each record's value. No one would argue, for example, that a cable from the Secretary of State to an Ambassador at a U.S. Embassy abroad about an impending crisis

or an electronic mail message written by the Secretary of State regarding the President's decision to declare war on another country has the same value as a GSA word processing file regarding procurement of desks, simply because both records were created by electronic technology. Unlike the GSA record, the Secretary of State's cable or electronic mail message documents unique and important operations of government that may have historic value. The Archivist should not use the same disposal criteria applied to the GSA procurement document on the Secretary's message just because both records are found in computers.

The government surely would not argue that Section 3303a(d) gives the Archivist authority to schedule the disposal of all handwritten records for disposal once their contents have been preserved in electronic or microfiche recordkeeping systems, simply because handwritten documents are created by a method common to all agencies.[24] A schedule that would include all handwritten documents would be inconsistent with the limited purpose of general schedules to provide an efficient method of disposing of records common to several or all agencies that do not possess long-term value. For the same reasons, it is inconsistent with the limited purpose of General Records Schedules to schedule all electronic records simply because they were created or stored on government computers. Simply put, Congress did not intend that records of such disparate value be lumped together under one disposition schedule. Such a method for disposing of records is not consistent with the responsibility placed on the

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[24] The government points to differences between handwritten and electronic records that explain why the disposition of electronic records should be handled through general schedules and the disposition of handwritten documents should not. Defs.' Reply Mem. in Support of Defs.' Mot. to Dismiss, or in the Alternative, for Summ. J. and in Opp. to Pls.' Cross-Mot. for Summ. J. ("Defs.' Reply") at 8. The government's argument, however, fails to address the troubling consequences of its interpretation of Section 3303a(d). Whether or not it is wise to schedule all handwritten records under a General Records Schedule, the government's interpretation of Section 3303a(d) would allow the Archivist to do just that.

Archivist to insure the protection and preservation of valuable government records.

In sum, the RDA and its legislative history, NARA' 5 own statements and the general schedules themselves leave little doubt that Congress intended general schedules to cover only administrative records, and not records relating to the substantive functions for which agencies are responsible, program records.

b. Electronic records do not lose their status as "program records" once they are preserved on paper

The government asserts that even if the RDA does not authorize the use of general schedules to dispose of program records, the Archivist has not exceeded his authority under the Act in promulgating GRS 20. It maintains that once all the information from an electronic record has been preserved in a paper, microfiche or other recordkeeping system (as required under GRS 20), and separately scheduled in accordance with agency disposition schedules submitted under 44 U.S.C. § 3303a(a), the original electronic version of that record is essentially a duplicate of the preserved copy and may be routinely destroyed. According to the government, it only possesses "temporary" value and therefore falls within the definition of "housekeeping" records as that term is understood for purposes of the RDA. Defs.' Mem. at 25-27.[25] The government claims that this understanding of the Archivist's authority under the RDA is consistent with the intent of Congress and in accord with longstanding regulatory guidance provided to agencies by the Archivist concerning the intrinsic

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[25] For this proposition, the government cites only the testimony of Dr. James E. O'Neill, Deputy Archivist of the United States before a House Subcommittee in 1977. *See Hearing before Subcomm. on Civil Service and General Services of the Comm. on Governmental Affairs*, 95th Cong., 1st Sess. 17 (1977) (testimony of Dr. James E. O'Neill, Deputy Archivist of the U.S.) ("records of a common nature" covered by the GRS series are "usually" housekeeping records of the agency, where "[t]he information contained in the record either has a very short life, is not worth preserving, or that information is incorporated in some more permanent record").

value of copies of records once the information contained in the records has been retained elsewhere. *Id.* at 26.

The government's argument is reminiscent of its earlier argument rejected by the court of appeals in *Armstrong II*, that electronic documents, once copied to paper, were no longer "records." *Armstrong II*, 1 F.3d at 1285. In *Armstrong II*, the court of appeals determined that an electronic message was a record required to be scheduled under the FRA unless it was an *identical* "extra cop[y] . . . preserved only for convenience of reference." *Id.* at 1284-85. The court also concluded that paper print-outs of electronic mail did not generally contain all the information in the electronic original and therefore were not exact duplicates of the electronic versions. Because "the electronic documents retain their status as federal records after the creation of the paper print-outs, . . all the FRA obligations concerning the management and preservation of records still apply." *Armstrong II*, 1 F.3d at 1283. As Judge Wald stated for the court, paper printouts that do not contain "all significant material" contained in the electronic records "cannot accurately be termed 'copies' -- identical twins -- but are, at most, 'kissing cousins.'" *Id.* at 1283. The court therefore concluded that electronic messages do not lose their status as records once they have been printed on paper. *Id.*

Although the government no longer argues that the process of printing out an electronic record takes away its status as a record, it now argues that the creation of a paper version of an electronic record takes away the electronic version's long-term value and, in turn, its status as a "program" record. Defs.' Mem. at 23-30. This argument is no more persuasive than the one rejected by the court of appeals in *Armstrong II*. While an exact duplicate of a particular record might be discardable, electronic versions of records cannot categorically be regarded as valueless "extra copies" of paper versions. *See Armstrong II*, 1 F.3d at 1283, 1285. Simply put, electronic communications are rarely identical to their paper counterparts; they are records unique and distinct from printed versions of the same record. *Id.* at 1285.

While GRS 20 addressed the court of appeals' specific concerns in *Armstrong II* by requiring that dates of transmission or receipt and the names of sender and recipients be preserved elsewhere before the electronic version of an electronic mail message is destroyed, Admin. Rec., Vol. III at 989 (GRS 20, Item 14), the administrative record in this case demonstrates that electronic records often have a number of other unique and valuable features not found in the paper print-outs of the records. For example, records in electronic recordkeeping systems have searching, manipulating and indexing capabilities not found in paper records, an advantage recognized by NARA itself. *See* Notice of Issuance of General Records Schedule, 60 Fed. Reg. at 44,643. In addition, electronic records can be transmitted over telephone or communication lines and therefore can be distributed or made available to the public more readily than paper copies.[26] Finally and most importantly, electronic records often contain information that is not preserved in a print-out record or even in other computerized systems of records.[27]

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[26] NARA itself has acknowledged this advantage of electronic records:

> The electronic format may also allow simultaneous use by multiple staff members and may provide a more efficient method to store records. Furthermore, when they are no longer needed by the creating agency, access by future researchers to permanently valuable electronic records would be enhanced by electronic preservation.

NARA, Final Rule, 60 Fed. Reg. 44,634, 44,639 (1995).

[27] Obviously not typical but nevertheless illustrative are the so-called PROF notes, computerized messages between Admiral Poindexter and Colonel North that played an important role in the trials of both Poindexter and North. *See* Final Report of the Independent Counsel for Iran/Contra Matters, Vol. I at 124. Admiral Poindexter, a computer expert, set up a special channel, known as "Private Blank Check," which allowed North and Poindexter to relay messages to each other without those messages being routed through channels accessible to other NSC staff. The communication itself was clearly important to investigators, but the mode of communication and the special channel through which it was sent, which would not have been reflected in paper printouts of the messages, was also important.

For example, paper print-outs of computer spreadsheets only display the results of calculations made on the spreadsheet, while the actual electronic version of the spreadsheet will show the formula used to make the calculations.. Admin. Rec., Vol. I at 205 (Comments of Public Citizen on NARA Proposal to Revise General Records Schedule 20). Some word processing systems allow users to annotate a document with "a summary" or "comments" that contain information on the author of the document, its purpose, the date that it was drafted or revised, and annotations by authors or reviewers. *See* Becker Decl. ¶¶ 4-6. These comments, however, usually do not appear on a printed copy of the record. *Id.* ¶ 7. Such differences between electronic and paper records illustrate the fact that the administrative, legal, research and historical value of electronic records is not always fully captured indeed, is usually not captured -- by paper or microfiche copies. Electronic records therefore do not become valueless duplicates or lose their character as "program records" once they have been printed on paper; rather, they retain features unique to their medium.

Because agencies are not required to determine if a scheduled record is a program record, it is inevitable that program records copied to paper will be destroyed under GRS 20. As the Court has explained, such a result would violate the intent of Congress, which unequivocally limited the scope of general schedules to administrative records. For this reason, too, the Court concludes that the promulgation of GRS 20 violated the Archivist's authority under Section 3303a(d).

2. Under GRS 20, the Archivist Fails to Carry out his Statutory Duty to Evaluate the Value of Records Scheduled for Disposal

Congress "intended, expected and positively desired private researchers. . . to have access to the documentary history of the federal government." *American Friends Serv. Comm. V. Webster*,

720 F.2d at 57. In furtherance of that goal Congress gave the Archivist and his staff primary responsibility for ensuring that historical and other valuable records are not destroyed by federal government entities. *See* Act of June 23, 1970, Pub. L. No. 91-287, § 2, 84 Stat. 320, 321-22 (1971) (giving sole approval authority over the disposal of records to NARA).

Congress was aware that "agencies, left to themselves, have a built-in incentive to dispose of records relating to [their] 'mistakes' . . . ." *American Friends Serv Comm. v. Webster*, 720 F.2d at 41. Thus, Congress directed the Archivist and. his staff not only to work with the agencies to develop appropriate record management procedures, but also to oversee the activities of federal agencies to ensure that the nation's documentary history is preserved for the public. *See* 44 U.S.C. § 2902(1) (listing first among the Act's goals the "[a]ccurate and complete documentation of the policies and transactions of the Federal Government"); *see also Armstrong I*, 924 F.2d at 288 (noting the "expressed statutory goal of preserving records for historical purposes").

The Archivist's oversight responsibilities are nowhere more evident than in the RDA, which carefully limits agency discretion in destroying records by requiring the Archivist to approve any determination that a record should be scheduled for destruction because it lacks sufficient administrative, legal, research or other value to warrant continued preservation. Under the RDA, an agency may submit a schedule of records sought to be discarded to the Archivist, but only the Archivist can approve the records destruction and can do so only if he concludes that they do not have "sufficient administrative legal research, or other value to warrant their continued preservation." 44 U.S.C § 3303a(a)[28]

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[28] *See Armstrong II*, 1 F.3d at 1287 (acknowledging agencies' ability to "purge incidental electronic records from their files by acting, *with the Archivist's approval*, to dispose of those documents that lack 'sufficient administrative, legal, research, or other value to warrant their continued preservation'") (emphasis in original).

While an agency may discard certain common types of records pursuant to General Records Schedules promulgated by the Archivist in advance, even then the Archivist makes the final determination that records scheduled for destruction do not possess sufficient value to warrant continued preservation. 44 U.S.C. § 3303a(d); *Armstrong II*, 1 F.3d at 1279.

In promulgating GRS 20, the Archivist has failed to carry out his duties under Section 3303a(d). He has made no determination that the records scheduled under GRS 20 lack sufficient administrative, legal, research or other value to warrant continued preservation. 44 U.S.C. § 3303a(d). Rather, he implicitly determined that no electronic records have sufficient administrative, legal, research or other value to warrant continued preservation once copies of such records are placed in paper, microfiche or electronic recordkeeping systems. This is an irrational determination, and one that is necessarily premised on the illogical notion that a paper copy adequately preserves the value of an electronic record. While, in some cases, paper copies may in fact adequately preserve the administrative, legal, research or historical value of an electronic record, there is no rational basis for the Archivist's conclusion that a paper copy invariably adequately preserves such value in *all* cases and that electronic records never retain any administrative, legal, research or other value once such records have been copied to paper.

By categorically determining that electronic records possess no administrative, legal, research or historical value beyond paper print-outs of the same document or record, the Archivist has absolved both himself and the federal agencies he is supposed to oversee of their statutory duties to evaluate specific electronic records as to their value. The Archivist has also given agencies carte blanche to destroy electronic versions without the Archivist's approval when the agency believes they are no longer needed by the agency. Because GRS 20 leaves the destruction of electronic versions of records unchecked by the Archivist, it fails to meet the requirements of Section 3303a(d).

3. GRS 20 Violates Section 3303a(d) Because It Does Not Specify the Period for Retention of Records

In addition to its other requirements, Section 3303a(d) of the Records Disposal Act permits the Archivist to authorize disposal of records under a general schedule only "after a lapse of specified periods of time" and only if such records will not "at the end of the periods specified" have sufficient value to warrant preservation. 44 U.S.C. § 3303a(d). In promulgating GRS 20, the Archivist exceeded his authority under Section 3303a(d) by failing to specify any periods of time for retaining records scheduled under GRS 20. Rather, the schedule provides that an agency should delete word processing files when the agency believes that they are "no longer needed for updating or revision," and electronic mail records "after copying to a recordkeeping system." Admin. Rec., Vol. III at 988-989 (GRS 20, Items 13 and 14). In fact, the introduction to GRS 20 states that

> NARA cannot establish a more specific retention that would be appropriate in all applications. Each agency should, when appropriate, determine a more specific disposition instruction, such as "Delete after X update cycle" or "Delete when X years old," for inclusion in its records directives or manuals. NARA approval is not needed to set retention periods for records in the GRS that are authorized for destruction when no longer needed.

Id. at 981 (GRS 20).

GRS 20's failure to specify a retention period violates the plain language and the purpose of the RDA. The language and structure of Section 3303a(d) make clear that "specified period" refers to an explicit identifiable period of time, a period of months or years: The Archivist may authorize disposal after "the lapse of specified periods of time . . . if such records will not, at the end of the periods specified" have sufficient value to warrant preservation. 44 U.S.C. § 3303a(d). Congress intended by this language that a specified retention period be set forth in each general schedule in order to bring uniformity across federal agencies as to the particular records covered by the schedule, not

that each agency be left to its own devices. *See* S. Rep. No. 91-914, at 3 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3297, 3299 (GSA comments) ("[g]eneral schedules authorize[] all agencies of Government to dispose of similar classes of useless records, for example, personnel and accounting records, on a uniform basis, . . . *and make retention periods for these records uniform throughout the Government*") (emphasis added). By requiring agencies to dispose of useless records after a defined time period, Congress intended to insulate the "regular and rapid elimination of useless papers" from the vagaries of individual agencies. H.R. Rep. No.78-559 at 4 (comments of Treasury Department that general schedules facilitate a more "regular and rapid elimination of useless papers").

Leaving to the agency the decision of "when" to discard records turns Section 3303a(d) on its head. Under GRS 20, an agency's decision to dispose of records determines the records' retention period. But Congress intended just the opposite - that the lapse of a specified retention period, along with a determination by the Archivist in advance, that the records will not possess value in the future, would govern when the records may be destroyed. The RDA unequivocally requires the Archivist's approval over any schedule submitted by, or imposed upon, a federal agency. *See* 44 U.S.C. § 3303a. The Archivist's failure to set a specified retention period in GRS 20 essentially removes the Archivist as a check on the destruction of electronic records.

While the vast majority of the hundreds of items in general schedules have specific retention periods, see Admin. Rec., Vol. III at 859-1001 (GRS 1-23), and leave little or no discretion in the agencies, the government correctly points out that GRS 20 does not stand alone and that in approximately thirty items throughout other general schedules the Archivist directs agencies to delete records "when no longer needed."[29] Like GRS 20, these items

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[29] *See, e.g.*, Admin. Rec., Vol. III at 861 (GRS 1, Item 4); *Id.* at 925-26 (GRS 9, Items 1 & 5); *Id.* at 955 (GRS 16, Item 2b); *Id.* at 959 (GRS 16, Item 10b); *Id.* at 961 (GRS 16, Item 14e); *Id.* at 963-67 (GRS 17, Items 1-10); *Id.* at 991-94

place the decision of when to destroy records entirely in the hands of the agencies. Such unbridled discretion is not consonant with the purpose of the mandatory general schedules and the intent of Congress. This case, however, is only a challenge to certain items in GRS 20, and the propriety of the other items is not an issue before this Court.[30]

C. *The Court's Ruling Will Not Hamper the Efforts of Federal Government Records Managers To Effectively Manage Electronic Records*

Although the Court holds that the Archivist exceeded his authority under Section 3303a(d) in promulgating GRS 20, the Court is careful to note that the governmment still has broad authority to schedule electronic records under Section 3303a.

First, federal agencies can submit to the Archivist individual agency schedules covering electronic records, which would then be reviewed by the Archivist to ensure that the scheduled electronic records will not possess administrative, legal, research, or other value after the proposed specified retention period. 44 U.S.C. § 3303a(a). Second, the Archivist has authority to promulgate general schedules covering electronic records that document housekeeping functions of federal agencies. 44 U.S.C. § 3303a(d). Finally, the Court's decision does not touch upon the Archivist's authority to dispose of records in his own legal custody, pursuant to Section 3303a(e). 44 U.S.C. § 3303a(e).

The government raises an important concern that many agencies do not have the capability at this time to preserve

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(GRS 21, Items 4, 7, 10, 11, 13, 15, 18, 20, 21, 25 &27); *Id.* at 999 (GRS 23, Item 5b); *Id.* at 1001 (GRS 23, Items 8 & 9).

[30] In addition, these other general schedules appear to give discretion to agencies over discrete sets of routine, housekeeping documents, while GRS 20 gives the agencies discretion over a wide array of program *and* housekeeping, having a potential impact on documents stored on every computer used by the federal government.

electronic records on electronic recordkeeping systems. Furthermore, storing electronic records on "live" computer systems is often not an effective way of preserving such records. Not only does storing files on live systems waste valuable computer memory, but, the government maintains, it is difficult to manipulate, search and index electronic records unless they are on electronic recordkeeping systems.

The solution to this problem is not to absolve all agencies of using electronic recordkeeping systems because some agencies do not have the capability to do so. Rather, it makes much more sense to require each agency to put forward its best records management strategy, taking into account its particular assets and deficiencies. Given that Congress established General Records Schedules, in large part, "to conserve space and filing equipment,"[31] the Archivist and NARA should be promulgating general schedules that encourage and prod agencies to establish space-saving electronic recordkeeping systems. While, as the government points out, "the day of the paperless office has not yet arrived," Def.'s Mem. at 33, computers have now become a significant part of the way the federal government conducts its business. The federal government must adapt its electronic recordkeeping capabilities to reflect that reality.

For many years, Congress has recognized the importance of maintaining certain types of government records and has established safeguards to insure that records with sufficient administrative, legal, research or other value are not destroyed. It should come as no surprise that electronic records, which take less storage space than paper records, should be subject to the same safeguards. While Congress has given the Archivist an enormous task in managing the federal government's records, the Court is confident that the Archivist will be able to efficiently dispose of electronic records within the structure provided by existing law.

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[31] H.R. Rep. No. 78-559 at 1.

V. CONCLUSION

For the foregoing reasons, plaintiffs' Motion for Summary Judgment is granted and defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment is denied. An Order consistent with this Opinion is entered this same day.

SO ORDERED.

[Signed] Paul Friedman
United States District Judge
DATE: 10/22/97

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
FILED OCT 22, 1997
Civil Action No.96-2840 (PLF)
PUBLIC CITIZEN, *et al.*,

Plaintiffs,

v.

JOHN CARLIN, in his official capacity as
Archivist of the United States, *et al.*,
Defendants.

ORDER AND JUDGMENT

Upon consideration of the plaintiffs' Motion for Summary Judgment, defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, the oppositions and replies, the administrative record and the oral arguments of counsel and for the reasons stated in the Opinion issued this same day, it is hereby

ORDERED that plaintiffs' Motion for Summary Judgment shall be, and hereby is, GRANTED. Judgment is entered for plaintiffs on all counts; it is

FURTHER ORDERED that defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment shall be, and hereby is, DENIED; it is

FURTHER ORDERED that the Court declares that General Records Schedule 20 is null and void; and it is

FURTHER ORDERED that the Court declares that defendant agencies Executive Office of the President, Office of Administration, and the United States Trade Representative may not destroy electronic records created, received or stored on

electronic mail or word processing Systems pursuant to General Records Schedule 20.

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE: 10/22/97

General Records Schedule 20;
Disposition of Electronic Records

[60 Fed. Reg. 44643-44650 (August 28, 1995)]

AGENCY: National Archives and Records Administration.

ACTION: Notice of issuance of General Records Schedule.

SUMMARY: General Records Schedules (GRS) are issued by the Archivist of the United States to provide disposal authorization for temporary records common to several or all agencies of the Federal Government. NARA is obliged by the Federal Records Act to issue such schedules, and Federal agencies are required to follow their provisions (44 U.S.C. 3303a(d)). On October 7, 1994, NARA published a notice in the Federal Register requesting comment on a revision of General Records Schedules. The revision included removal of several items from GRS 23, Records Common to Most Offices Within Agencies, and consolidation of those items with other electronic records in GRS 20. Other changes were made to clarify and extend the coverage of some of the items. The following is a summary of the comments received and NARA's response. The final GRS 20 was approved on August 14, 1995.

FOR FURTHER INFORMATION CONTACT: James J. Hastings, Director, Records Appraisal and Disposition Division, National Archives at College Park, 8601 Adelphi Road, College Park, MD 20740-6001. (301) 713-7100, ext. 274.

SUPPLEMENTARY INFORMATION:

Background

NARA proposed consolidating authority for the disposition of generic electronic records into General Records Schedule (GRS) 20, Electronic Records, by moving several items from GRS 23, Records Common to Most Offices Within Agencies, to GRS 20. On August 14, 1995, the Archivist of the United States approved the revised GRS 20. It is now in effect.

The revised GRS 20 authorizes deletion of certain types of

electronic records associated with large data base systems, such as inputs, outputs, processing files, special format files, and system documentation for systems that have been appraised by NARA as temporary. To protect potentially permanent records, several of these items are limited by specific exclusions. As a result of the move of GRS 23 items that pertain to electronic records into GRS 20, the revised GRS 20 also authorizes deletion of records on word processing and electronic mail systems once a recordkeeping copy has been made, and authorizes deletion of electronically-generated administrative spreadsheets and other administrative records that are included in recordkeeping systems that have been authorized for disposal by NARA. All electronic records not covered by GRS 20 or other General Records Schedules must be scheduled individually.

For convenience of reference, the revised GRS 20 and GRS 23 are printed at the end of this notice.

Comments and Responses

NARA received 37 written responses after publication of the proposed changes to GRS 20 and 23 in the Federal Register on October 17, 1994. Fourteen of the comments were submitted by Federal agencies and 23 were submitted by members of the public. The responses from Federal agencies were supportive of the changes; two wrote only to provide concurrence. Comments from the Federal agencies focused on the coverage and applicability of the General Records Schedules; ten requested clarifications or suggested changes. One agency commented on the overall coverage of the GRS. The comments from twenty-one members of the public and professional organizations, two Federal agencies, and two state archivists were critical of the proposal. Except for the response from one state archivist, all critical comments were based on a belief that implementation of the revised schedules would result in destruction of valuable Federal documentation.

Neither the agencies nor the public commented on the revised GRS 23.

Several agencies made general comments on the GRS or

specifically on GRS 20 that were not responsive to the notice in the Federal Register. Nevertheless, NARA will carefully review these comments and will consider incorporating them in future changes to the GRS, NARA handbooks or other guidance. They will not be addressed in this notice.

The comments that were received included some that were general and applied to more than one of the items in the proposed GRS. Others were specifically directed to one particular item. The comments and responses listed below pertain first to the overall comments and then to those that were addressed to specific items.

The full set of comments on the revision to GRS 20 that was proposed on October 17, 1994, is available for public inspection at the National Archives at College Park, Records Appraisal and Disposition Division, Room 2100, 8601 Adelphi Road, College Park, MD 20740.

1. Value of Electronic Records

a. *Comments.* Twenty-six respondents expressed an overall concern about the changes to GRS 20. In their opinion GRS authorization for deletion of electronic versions of records that had been converted to paper or microform would be inappropriate. They stressed that hard copy records are not satisfactory replacements for records in electronic format and cited the well-known advantages of electronic records for future research. They believe that the substitution of hard copy records would hamper the work of future researchers, so agencies should be required to preserve electronically the records that they create on computers. Respondents cited several examples of the feasibility of preserving electronic records, including the State Department's Foreign Affairs Information System, a system in the Canadian Trade Negotiations Office, and a pilot project at the Navy Research Laboratory as examples of the feasibility of preserving records electronically.

b. *Response.* NARA has recognized for many years the advantages electronic records have for searching, manipulating, and storing information. In 1968 NARA established an

organizational unit to develop policies for the selection and preservation of electronic records. Since that time NARA's appraisal guidelines have stressed the added value brought by the manipulability of automated data. In addition to the initial focus on archival preservation of electronic records, NARA concentrated on implementing its statutory obligation to provide agencies with the authority to delete electronic records that have only temporary value. Accordingly, the first version of GRS 20 was published in 1972 to provide disposal authority for specific categories of temporary records associated with mainframe applications. Excluded from its coverage, and all subsequent revisions, were the types of records generated by large data systems that might have archival value.

A 1988 revision of the GRS extended disposal authority to specific categories of records generated by end-user applications on stand-alone or networked computers used by individuals. This new GRS, General Records Schedule 23, covered word processing, electronic mail, spreadsheets, and administrative data bases. The items concerning these applications authorized the deletion of the electronic versions of records created after they were printed to hard copy. Use of word processing software evolved from use of typewriters and stand-alone word processors used to produce paper documents. Even as networks were installed, agencies continued to maintain records produced with office automation applications in organized paper files, especially since end-user applications were not designed to classify, index, and maintain documents for their authorized retention period.

NARA's final standards for the management of e-mail and the revision to GRS 20 that has now been approved clarify the disposition authority for electronic records produced by end-users. The GRS 23 that was approved in 1988 authorized deletion of word processing and e-mail records from the ``live" system after they had been copied to paper or microform. This authority has now been moved to GRS 20 and is extended to authorize deletion of electronic mail and word processing records from the ``live"

system after they have been copied to an electronic recordkeeping system. It also clearly states the requirement to preserve transmission data with electronic mail records to ensure that their context as well as content are preserved. GRS 20 does not authorize the deletion of the versions of electronic mail or word processing records that have been placed in the agency's recordkeeping system.

The new GRS 20 recognizes that electronic mail and word processing applications are used to create Federal records, including some permanent records. Separate NARA guidance and regulations instruct agencies to appropriately preserve records that are produced through office automation in the form that they determine is best to accomplish their mission within their administrative and fiscal capabilities.

GRS 20, NARA regulations, and NARA guidance instruct agencies to identify records created using office automation and to maintain them in a recordkeeping system that preserves their content, structure, and context for their required retention period. For records to be useful they must be accessible to all authorized staff, and must be maintained in recordkeeping systems that have the capability to group similar records and provide the necessary context to connect the record with the relevant agency function or transaction. Storage of electronic mail or word processing records on electronic information systems that do not have these attributes will not satisfy the needs of the agency or the needs of future researchers.

Search capability and context would be severely limited if records are stored in disparate electronic files maintained by individuals rather than in agency-controlled recordkeeping systems. Furthermore, if electronic records are stored in electronic information systems without records management functionality, permanent records may not be readily accessible for research. Unless the records are adequately indexed, searches, even full-text searches, may fail to find all documents relevant to the subject of the query. In addition, numerous irrelevant temporary records, that would be segregable in systems with records management

functionality, may be found. Agency records can be managed only if they are in agency recordkeeping systems.

The respondents who expressed this concern mistakenly concluded that the proposed GRS 20 authorized the deletion of valuable records. On the contrary, GRS 20 requires the preservation of valuable records by instructing agencies to transfer them to an appropriate recordkeeping system. Only after the records have been properly preserved in a recordkeeping system will agencies be authorized by GRS 20 to delete the versions on the electronic mail and word processing systems. As indicated, most agencies have no viable alternative at the present time but to use their current paper files as their recordkeeping system. As the technology progresses, however, agencies will be able to consider converting to electronic recordkeeping systems for their records.

The critical point is that the revised GRS does not authorize the destruction of the recordkeeping copy of the electronic mail and word processing records. The unique program records that are produced with office automation will be maintained in organized, managed office recordkeeping systems. Federal agencies must have the authority to delete the original version from the ``live" electronic information system to avoid system overload and to ensure effective records management. Program records that have been transferred to the recordkeeping system will not be affected by GRS 20. Their disposition is controlled by other general or specific records schedules.

NARA appraises and schedules records in organized recordkeeping systems. It is essential for the originating agency, for NARA, and for future researchers that records, especially those appraised as permanent, be maintained in recordkeeping systems with records management functionality to allow for appropriate maintenance and disposition.

The examples cited by some of the respondents as support for their position serve more as useful illustrations of NARA's position. The Department of State's Foreign Affairs Information System (now the Automated Data System) is not a word processing or electronic communications system. It is a

recordkeeping system that stores, indexes, and retrieves the Department's important program records. It is not related in any way to GRS 20. The system was appraised as permanent by NARA in 1983 and consists of an automated index, microfilm copies of paper documents, computer output microfilm of electronic message traffic, and digitally stored texts of electronic message traffic. This is an excellent example of the benefits of transferring records from various formats to a recordkeeping system to ensure their continued availability to staff and preservation for NARA.

The Canadian Trade Negotiation Office did not have an electronic recordkeeping system for its office automation records. It maintained its records either on-line, on paper, or on backup tapes. The backup tapes were acquired in their entirety by the National Archives of Canada. They consisted of a complicated mixture of data, files, documents, directories, and software and included records that had permanent value, records with no archival value, and duplicates. If the records had been maintained on a recordkeeping system in the agency, the Canadian National Archives would have been able to identify, appraise, and acquire only records with permanent value and allow the agency to dispose of the remainder. Because of the great value of the records and the significance of the agency, the National Archives of Canada undertook extraordinary measures to impose basic intellectual order on the system data, files, and directories to make them retrievable. Despite this time consuming project, information concerning the Trade Negotiation Office's functions, activities, and records management practices was not recreated. The Canadian experience with this project is a powerful example of the need for records to be preserved by an agency on a recordkeeping system.

The pilot project by the Navy Research Laboratory cited by respondents also supports NARA's position that records need to be maintained in a recordkeeping system. The Navy project was conducted by an agency historian who invested approximately one hour to categorize 100-150 messages that were maintained on the

electronic mail system. Additional time was required to edit entries for input into a separate database and to manage the database. Federal agencies routinely create or receive tens of thousands of messages per day. If these records were preserved and managed in a recordkeeping system, as advocated by NARA, such labor intensive, time consuming work as was done in the Navy pilot project would not be necessary. If, on the other hand, Federal agencies were to adopt the Navy pilot project as a model they would be required to analyze each message individually, provide whatever context would be necessary, and enter the data into a database. If an agency has an average of 40,000 messages per week (a relatively low average), this would require approximately 400 staff hours, the equivalent of 10 full time employees, just to categorize the messages. This is an expenditure that no agency can afford and is, no doubt, the reason that the Navy did not implement the recommendations of the pilot project.

Agencies must maintain their records in organized files that are designed for their operational needs. Agencies that currently have traditional paper files print their electronic mail records, word processing records, spreadsheets, and data base reports so that their files are complete, comprehensible, and in context with related records. Agency functions that have not been automated must be supported by hard copy files, even when some types of related records are generated electronically. Agencies that decide to maintain their records in electronic recordkeeping systems do so for compelling operational needs, not for future researchers. In some cases, such as the State Department example cited by respondents, agencies create automated indexes to hard-copy records rather than digitizing all of the records themselves. In any case, the decision must be based on an analysis of the needs of and benefits to the agency, balanced against available resources. The role of NARA is to provide guidance and regulations that, when properly implemented, will result in agency recordkeeping systems that protect records for their authorized retention period, and, for permanent records, in a format that allows transfer to the National Archives.

If agencies were to maintain their electronic mail and word processing records on electronic information systems that do not provide the necessary records management functions, just for the sake of maintaining them in electronic format as many respondents advocate, the records would be of limited use to both the originating agency and to future researchers. Such a practice would not support agency operations, and researchers would have to search disassociated, unindexed collections of materials for potentially valuable records, which would result in finding a large proportion of irrelevant documents, an inefficient use of research time.

2. Disposition Instructions

a. *Comments.* One agency and a member of the public expressed concern about the GRS 20 disposition instructions. They said that ``delete when no longer needed'' was too vague or too broad. A state archivist also expressed concern that the schedule would authorize destruction of electronic records and related documentation needed for establishing authenticity and legal admissibility of electronic records.

b. *Response.* In response to these concerns, NARA has replaced ``delete when no longer needed'' with ``delete when the agency determines that they are no longer needed for administrative, legal, audit, or other operational purposes'' for items 1a, 1c, 3b(1), 3b(3), 4, 5, 6, 7, 9, 12a, and 12b. NARA also revised the disposition instruction for item 13 to read ``delete from the word processing system when no longer needed for updating, revision, or convenience of reference,'' and the disposition instruction for item 14 was changed to read ``delete from the e-mail system when no longer needed for convenience of reference.'' In addition, NARA changed the disposition for item 11a to read ``destroy or delete when superseded or obsolete, or upon authorized deletion of the related master file or data base, or upon the destruction of the output of the system if the output has legal value, whichever is latest.''

* * * * *

5. Item 13

a. *Comments*. One agency stated that item 13, Word Processing Files, is inappropriate because disposition should be based on content, not media. Another agency suggested that item 13 should provide authorization for deletion of superseded drafts.

b. *Response*. NARA believes that this item responds to a real need. As indicated earlier, the GRS has covered the original version of word processing records since 1988. Over the years many agencies have told NARA that it has proven very useful to them conducting their records management programs. By providing authorization for deletion of the word processing copy of documents that are preserved elsewhere in a recordkeeping system, NARA has freed Federal records officers from scheduling the duplicative records in those systems. Consequently, the records officers can concentrate on scheduling the unique electronic records in their agencies.

NARA has not added provisions to this item concerning draft documents. In most cases, drafts are nonrecord materials so no disposition authority is required. In those instances where drafts created on word processing systems are records, as described in NARA regulations (36 CFR 1222.34), the revised GRS 20 will cover them as it covers other records generated electronically. No further authorization is needed in the GRS. NARA will be issuing guidance on agency recordkeeping requirements that includes a discussion of drafts and provides criteria for determining when they are records.

NARA did modify item 13 as a result of numerous meetings and discussions with records officers and other interested parties, and further analysis of recordkeeping requirements. Records must be available to all authorized users and properly managed to ensure their authorized, timely, and appropriate disposition. Documents meeting the definition of record that are only in individuals' word processing directories, rather than agency recordkeeping systems, are not accessible to other staff members. Even accessible network word processing directories are inadequate if they are part of information systems that lack

records management functionality. It is critical that agencies instruct their staff members to copy or transfer any word processing documents that are Federal records to paper or electronic recordkeeping systems. Consequently, NARA deleted subitem 13b. This subitem would have authorized deletion of records that were maintained only on the word processing system until the expiration of the retention period authorized by another GRS item or agency schedule. The deletion of item 13b from GRS 20 reinforces the necessity for agencies to properly maintain Federal records in recordkeeping systems.

6. Item 14

a. *Comments*. One agency suggested that item 14, Electronic Mail Records, should authorize deletion of recipients' copies of messages unless the recipient's copy has been designated by the agency as a record. The same agency requested that NARA add a subitem to authorize deletion when no longer needed of routine types of messages, such as meeting announcements and acknowledgments. Another agency suggested that item 14 include definitions of transmission data and receipt data and an agency suggested that GRS 20 address the issue of record status determinations. Two agencies expressed concern that item 14 would require electronic maintenance of electronic mail. Many public respondents objected to item 14 because it permitted hard copy records to be substituted for electronic versions (see comments and response number 1).

b. *Response*. NARA has modified the item and the introduction to GRS 20 to provide more information on transmission and receipt data.

Item 14 also has been modified to drop its prior reference (item 14b) to records maintained on the electronic mail system itself. Just as with word processing records, e-mail records must be maintained in recordkeeping systems that allow accessibility and proper records management. See the response to comments on item 13, above, for further explanation of this change.

Otherwise, NARA has not adopted the suggestions

concerning this item. Blanket authorization for deletion of recipients' copies of messages would be inappropriate. Sometimes such copies are unique Federal records. For example, messages received through external systems would not be duplicated elsewhere in the agency. Also, to ensure file integrity, recipients' copies of messages often need to be incorporated into a recordkeeping system in the recipient's office. Agencies are responsible for issuing instructions on identifying record copies of documents, consistent with NARA regulations and guidance. Because the GRS is a records disposition schedule, it is not the appropriate mechanism for addressing records creation issues. NARA will address these issues in standards or guidance dealing with records creation and maintenance. As indicated in the response number 1, GRS 20 does not require maintenance of electronic mail records in electronic form. Item 14 specifically covers electronic mail records converted to paper or microform, as well as those copied for maintenance in electronic recordkeeping systems.

During the past two years NARA has worked closely with Federal agencies on the development of records management guidance concerning electronic mail. NARA staff members have consulted extensively with records managers and information resource officials in major agencies on the development of records management guidance for electronic mail, and, after publication of proposed standards on March 24, 1994 (59 FR 13906), held discussion meetings and made presentations attended by over 840 agency records managers, information resource managers, legal staff, and others. Based on knowledge and experience, NARA believes that implementation of this GRS change, along with revised regulations and NARA guidance, will significantly improve the quality of Federal documentation by appropriate preservation of electronic mail records. NARA has given authority under the Federal Records Act to the Federal agencies to delete electronic mail records from their electronic mail systems only after a copy of the full message with names of senders and addresses and date of transmission, and receipts when required,

have been preserved elsewhere.

7. Item 15

a. *Comments:* The public comments included a concern that item 15, Spreadsheets, could authorize the destruction of critical information that is in the electronic version of a spreadsheet that would not be in a paper printout. The printout would only contain the results of the computation, not the formulas or other information that was used to reach the results. Such computational information should be preserved with the electronic spreadsheet, particularly when it concerns important budgetary, funding, or other analysis.

b. *Response:* The coverage of item 15, as proposed in October 1994, was not clear. It was not intended to apply to all program-related spreadsheets that were developed for agency use. As the respondents correctly indicated, if this item were to apply to program records generally its application could have resulted in the loss of potentially valuable information that was used to produce a spreadsheet. Consequently, item 15 has been rewritten to clarify the limitation of its coverage. It now authorizes the deletion of electronic spreadsheets only if they support administrative, rather than program, functions or if they were generated by an individual only for background purposes.

Conclusion

The Federal Government generates an incalculable number of paper, electronic, and audiovisual records every day. The vast majority (95- 98%) of these are temporary records and many fit into categories that are common throughout the Government. The GRS is a mechanism mandated by law to provide disposition authorities for such common temporary records. GRS 20 is designed to provide authority for the deletion of common temporary records that are generated by computers. As indicated in the responses to comments above, approval of GRS 20 will not affect unique program records that have been preserved in a recordkeeping system. Federal agency records officers are responsible for scheduling the records that are not covered by the

GRS. GRS 20 will allow agencies and NARA to concentrate more resources on unique program records. Approval of the revised GRS 20 will allow NARA to continue to focus attention on electronic records with enduring value by eliminating a large proportion of those without such value from further consideration.

Dated: August 14, 1995.

John W. Carlin,

Archivist of the United States.

Following is the text of GRS 20 and GRS 23.

General Records Schedule 20

Electronic Records

This schedule provides disposal authorization for certain electronic records and specified hard-copy (paper) or microform records that are integrally related to the electronic records.

This schedule applies to disposable electronic records created or received by Federal agencies including those managed for agencies by contractors. It covers records created by computer operators, programmers, analysts, systems administrators, and all personnel with access to a computer. Disposition authority is provided for certain master files, including some tables that are components of data base management systems, and certain files created from master files for specific purposes. In addition, this schedule covers certain disposable electronic records produced by end users in office automation applications. These disposition authorities apply to the categories of electronic records described in GRS 20, regardless of the type of computer used to create or store these records.

GRS 20 does not cover all electronic records. Electronic records not covered by GRS 20 may not be destroyed unless authorized by a Standard Form 115 that has been approved by the National Archives and Records Administration (NARA).

The records covered by several items in this schedule are authorized for erasure or deletion when the agency determines that they are no longer needed for administrative, legal, audit, or other

operational purposes. NARA cannot establish a more specific retention that would be appropriate in all applications. Each agency should, when appropriate, determine a more specific disposition instruction, such as ``Delete after X update cycles'' or ``Delete when X years old,'' for inclusion in its records disposition directives or manual. NARA approval is not needed to set retention periods for records in the GRS that are authorized for destruction when no longer needed.

Items 2a and 1a (in part) of this schedule apply to hard-copy or microform records used in conjunction with electronic files. Item 1 also covers printouts produced to test, use, and maintain master files. Items 10 and 11 of this schedule should be applied to special purpose programs and documentation for disposable electronic records whatever the medium in which such documentation and programs exist.

This schedule has been revised to include electronically-generated records previously covered in General Records Schedule 23, Records Common to Most Offices. The original numbering of the items in GRS 20 has been preserved. The items moved from GRS 23 have been added at the end, except the item covering administrative data bases that has been incorporated into item 3.

Electronic versions of records authorized for disposal elsewhere in the GRS may be deleted under the provisions of item 3 of GRS 20.

See also 36 CFR Part 1234 for NARA regulations on electronic records management.

* * * * *

13. Word Processing Files

Documents such as letters, memoranda, reports, handbooks, directives, and manuals recorded on electronic media such as hard disks or floppy diskettes after they have been copied to an electronic recordkeeping system, paper, or microform for recordkeeping purposes.

Delete from the word processing system when no longer

needed for updating or revision.

14. Electronic Mail Records

Senders' and recipients' versions of electronic mail messages that meet the definition of Federal records, and any attachments to the record messages after they have been copied to an electronic recordkeeping system, paper or microform for recordkeeping purposes.

Delete from the e-mail system after copying to a recordkeeping system.

(Note: Along with the message text, the recordkeeping system must capture the names of sender and recipients and date (transmission data for recordkeeping purposes) and any receipt data when required.)

15. Electronic Spreadsheets

Electronic spreadsheets generated to support administrative functions or generated by an individual as background materials or feeder reports.

a. When used to produce hard copy that is maintained in organized files.

Delete when no longer needed to update or produce hard copy.

b. When maintained only in electronic form.

Delete after the expiration of the retention period authorized for the hard copy by the GRS or a NARA-approved SF 115. If the electronic version replaces hard copy records with differing retention periods and agency software does not readily permit selective deletion, delete after the longest retention period has expired.

* * * * *

U.S.C. TITLE 44 -
PUBLIC PRINTING AND DOCUMENTS

CHAPTER 33 - DISPOSAL OF RECORDS

§ 3301. Definition of records

As used in this chapter, "records" includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included.

§ 3303. Lists and schedules of records to be submitted to the Archivist by head of each Government agency

The head of each agency of the United States Government shall submit to the Archivist, under regulations promulgated as provided by section 3302 of this title -

(1) lists of any records in the custody of the agency that have been photographed or microphotographed under the regulations and that, as a consequence, do not appear to have sufficient value to warrant their further preservation by the Government;

(2) lists of other records in the custody of the agency not

needed by it in the transaction of its current business and that do not appear to have sufficient administrative, legal, research, or other value to warrant their further preservation by the Government; and

(3) schedules proposing the disposal after the lapse of specified periods of time of records of a specified form or character that either have accumulated in the custody of the agency or may accumulate after the submission of the schedules and apparently will not after the lapse of the period specified have sufficient administrative, legal, research, or other value to warrant their further preservation by the Government.

§ 3303a. Examination by Archivist of lists and schedules of records lacking preservation value; disposal of records

(a) The Archivist shall examine the lists and schedules submitted to him under section 3303 of this title. If the Archivist determines that any of the records listed in a list or schedule submitted to him do not, or will not after the lapse of the period specified, have sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government, he may, after publication of notice in the Federal Register and an opportunity for interested persons to submit comment thereon -

(1) notify the agency to that effect; and

(2) empower the agency to dispose of those records in accordance with regulations promulgated under section 3302 of this title.

(b) Authorizations granted under lists and schedules submitted to the Archivist under section 3303 of this title, and schedules promulgated by the Archivist under subsection (d) of

this section, shall be mandatory, subject to section 2909 of this title. As between an authorization granted under lists and schedules submitted to the Archivist under section 3303 of this title and an authorization contained in a schedule promulgated under subsection (d) of this section, application of the authorization providing for the shorter retention period shall be required, subject to section 2909 of this title.

(c) The Archivist may request advice and counsel from the Committee on Rules and Administration of the Senate and the Committee on House Administration of the House of Representatives with respect to the disposal of any particular records under this chapter whenever he considers that -

(1) those particular records may be of special interest to the Congress; or

(2) consultation with the Congress regarding the disposal of those particular records is in the public interest. However, this subsection does not require the Archivist to request such advice and counsel as a regular procedure in the general disposal of records under this chapter.

(d) The Archivist shall promulgate schedules authorizing the disposal, after the lapse of specified periods of time, of records of a specified form or character common to several or all agencies if such records will not, at the end of the periods specified, have sufficient administrative, legal, research, or other value to warrant their further preservation by the United States Government. A Federal agency may request changes in such schedules for its records pursuant to section 2909 of this title.

(e) The Archivist may approve and effect the disposal of records that are in his legal custody, provided that records that had been in the custody of another existing agency may not be

disposed of without the written consent of the head of the agency.

(f) The Archivist shall make an annual report to the Congress concerning the disposal of records under this chapter, including general descriptions of the types of records disposed of and such other information as he considers appropriate to keep the Congress fully informed regarding the disposal of records under this chapter.

* * * * *

§ 3314. Procedures for disposal of records exclusive

The procedures prescribed by this chapter are exclusive, and records of the United States Government may not be alienated or destroyed except under this chapter.

(2)

Supreme Court, U.S.
FILED
FEB 4 2000

No. 99-782

In the Supreme Court of the United States

PUBLIC CITIZEN, ET AL., PETITIONERS

v.

JOHN CARLIN, ARCHIVIST OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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31pp

QUESTION PRESENTED

Whether the Records Disposal Act, 44 U.S.C. 3301-3324 (1994 & Supp. III 1997), authorized the Archivist of the United States to issue General Records Schedule 20, which allows agencies to delete unneeded electronic records stored on "live" (*i.e.*, actively used) electronic mail or word processing systems after those records have been copied and preserved in an electronic, paper, or microform recordkeeping system.

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In the Supreme Court of the United States

No. 99-782

PUBLIC CITIZEN, ET AL., PETITIONERS

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JOHN CARLIN, ARCHIVIST OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 184 F.3d 900. The opinion of the district court (Pet. App. 21a-53a) is reported at 2 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1999. The petition for a writ of certiorari was filed on November 4, 1999. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the validity of a "general records schedule," GRS 20, issued by the Archivist of the United States. GRS 20 permits federal agencies,

among other things, to delete unneeded electronic versions of records from "live" word-processing and other actively used electronic systems once the records have been preserved—on paper, in electronic format, or on microform—in the agency's recordkeeping system.

1. A series of statutes, cumulatively known as the Federal Records Act (FRA), governs the creation, preservation, and disposition of federal records by federal agencies. 44 U.S.C. 2101-2118, 2901-2909, 3101-3107, 3301-3324 (1994 & Supp. III 1997).[1] The FRA's general purpose is "to require the establishment of standards and procedures to assure efficient and effective records management." 44 U.S.C. 2902.[2] To that end, the FRA requires that agencies "make and preserve records containing adequate and proper documentation of the organization, functions, policies, deci-

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[1] The term "records" as used in the FRA includes "all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation * * * as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them." 44 U.S.C. 3301.

[2] That general goal of effective records management includes, but is not limited to, the promotion of "[a]ccurate and complete documentation of the policies and transactions of the Federal Government"; "[c]ontrol of the quantity and quality of records"; "[e]stablishment and maintenance of mechanisms of control with respect to records creation in order to prevent the creation of unnecessary records"; "[s]implification of the activities, systems, and processes of records creation and of records maintenance and use"; and "[j]udicious preservation and disposal of records." 44 U.S.C. 2902.

sions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities." 44 U.S.C. 3101. In addition, each agency must "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency." 44 U.S.C. 3102.

The FRA charges the Archivist with establishing "standards for the selective retention of records of continuing value," and with "assist[ing] Federal agencies in applying the standards to records in their custody." 44 U.S.C. 2905(a).[3] The Records Disposal Act, in turn, prohibits agencies from disposing of records without the Archivist's approval. 44 U.S.C. 3303a(a) (1994 & Supp. III 1997). Agency heads must submit to the Archivist: (1) lists of any agency records "that have been photographed or microphotographed" and that, as a consequence, "do not appear to have sufficient value to warrant their further preservation"; and (2) lists of other records that are not needed in the transaction of current business "and that do not appear to have sufficient administrative, legal, research, or other value to warrant their further preservation by the Government." 44 U.S.C. 3303(1) and (2). See also 44 U.S.C. 3303a (1994 & Supp. III 1997). The statute also permits agency heads to submit to the Archivist,

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[3] The Archivist also must "provide guidance and assistance to Federal agencies with respect to ensuring adequate and proper documentation of the policies and transactions of the Federal Government and ensuring proper records disposition." 44 U.S.C. 2904(a). The Administrator of the General Services Administration (GSA) has a similar responsibility to "provide guidance and assistance to Federal agencies to ensure economical and effective records management." 44 U.S.C. 2904(b).

for approval, "schedules proposing the disposal after the lapse of specified periods of time of records of a specified form or character that either have accumulated in the custody of the agency or may accumulate after the submission of the schedules," where those records "apparently will not after the lapse of the period specified have sufficient administrative, legal, research, or other value to warrant their further preservation by the Government." 44 U.S.C. 3303(3).

Section 3303a(d) of Title 44 also authorizes the Archivist to issue "general records schedules" to govern the disposition of "records of a specified form or character common to several or all agencies." The Archivist may issue general records schedules "authorizing the disposal" of such records "after the lapse of specified periods of time," where the records "will not, at the end of the periods specified, have sufficient administrative, legal, research, or other value to warrant their further preservation by the United States Government." 44 U.S.C. 3303a(d). Pursuant to that authority, the Archivist has promulgated 23 general records schedules covering a wide array of records common to all or most agencies. See generally 36 C.F.R. 1228.44.

2. The Archivist first issued a general records schedule covering electronic records created by mainframe computers in 1972. See 60 Fed. Reg. 44,643, 44,644 (1995). In 1994, the Archivist issued a request for public comment on proposed revisions to GRS 20, which governs the disposition of a wide variety of electronic records on stand-alone and networked computers, 59 Fed. Reg. 13,906 (1994), and on proposed revisions to recordkeeping requirements for electronic mail, 59 Fed. Reg. 52,313 (1994). Following review of the comments, the Archivist determined that federal agencies do not have the capacity to preserve electronic

information indefinitely on the "live" office computer systems and applications used on a day-to-day basis by agency personnel. Instead, agencies must delete records "to avoid system overload and to ensure effective records management." 60 Fed. Reg. at 44,644. The Archivist also found that requiring agencies to continue preserving information on "live" word processing systems would be of little benefit to agency personnel or researchers, because those systems consist of disparate electronic files maintained by individuals, rather than centrally controlled and organized recordkeeping systems. *Id.* at 44,646.

Consistent with those conclusions, the Archivist amended GRS 20 to permit the disposal of certain electronic records in 15 enumerated categories—including electronic records created by computer operators, programmers, analysts, and systems administrators, as well as government staff using office automation applications—from "live" desktop computer applications, but only after *two* conditions are met. First, the electronic records to be deleted may not be disposed of until after they have ceased to be useful to the agency. Second, they may not be disposed of until after they have been copied (in an electronic format or on paper or microform) to the agency's official recordkeeping system. Pet. App. 69a-71a.

For example, Item 13 of GRS 20 governs electronic copies of word processing records on "live" word processing applications. Item 13 permits electronic copies of word processing files to be deleted from the word processing system "after they have been copied to an electronic recordkeeping system, paper, or microform for recordkeeping purposes," if they are "no longer needed for updating or revision." 60 Fed. Reg. at 44,649. Item 14 of GRS 20 covers copies of electronic

mail messages that qualify as records. It permits deletion of "[s]enders' and recipients' versions of" such electronic mail messages from a live e-mail system only "after they have been copied to an electronic recordkeeping system, paper or microform for recordkeeping purposes." *Ibid.* Item 14 goes on to state that "[a]long with the message text, the recordkeeping system must capture the names of sender and recipients and date (transmission data for recordkeeping purposes) and any receipt data when required." *Ibid.*

3. Petitioners are several not-for-profit library and historical associations as well as two private individuals. They brought this action against the Archivist and three other Executive Branch entities, alleging that GRS 20 exceeds the scope of the Archivist's statutory authority and is arbitrary and capricious.[4]

The district court granted summary judgment for petitioners, holding that the Archivist exceeded the scope of his statutory authority in promulgating GRS 20. Pet. App. 36a.[5] First, the district court held that GRS 20 exceeds the Archivist's authority under 44

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[4] Count two of the complaint challenged the disposition, under GRS 20, of word processing documents created by the Office of the United States Trade Representative (USTR) from 1986 through 1992, and preserved on "backup tapes" pursuant to an injunction in earlier litigation. After petitioners brought this action, USTR notified the Archivist that it wished to withdraw its disposition schedule for those records and to submit a separate disposition schedule without relying on GRS 20. The district court denied the government's motion to dismiss count two as moot. Pet. App. 32a-33a. The government did not appeal with respect to that issue.

[5] The district court also denied the government's motion for summary judgment, holding that petitioners have standing (Pet. App. 27a-32a), and that the Executive Office of the President is a proper party to this action (*id.* at 33a-35a).

U.S.C. 3303a(d) because it authorizes the disposition of so-called "program" records reflecting substantive agency decisions and activities. According to the district court, Section 3303a(d) empowers the Archivist to issue general records schedules only for "routine housekeeping records." Pet. App. 38a-40a.

Second, the district court held that the Archivist failed to determine whether the records that GRS 20 schedules for disposal will have "sufficient administrative, legal, research or other value to warrant continued preservation" at the time disposal is authorized. Pet. App. 47a. The court reasoned that, although paper copies may adequately preserve the value of an electronic record in some instances, the Archivist could not determine that paper copies would preserve the value of electronic records in all cases. *Id.* at 48a. Third, the district court held that, by allowing disposal of records "when no longer needed" (after copies are placed in the recordkeeping system), GRS 20 fails to provide for disposal of records after "specified periods of time" within the meaning of 44 U.S.C. 3303a(d). Pet. App. 49a-51a.

4. The court of appeals reversed. Pet. App. 1a-20a. Applying the two-step analysis of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court first rejected petitioners' contention that 44 U.S.C. 3303a(d) limits the Archivist to issuing general records schedules for so-called "housekeeping" records. Pet. App. 5a-11a. The court of appeals observed that the statutory language does not distinguish between "housekeeping" and "program" records; instead, it gives the Archivist authority to schedule for disposal *all* "records of a specified form or character." *Id.* at 5a. The statute's plain text, the court concluded, thus "seems to reject rather than to compel

the proffered distinction between program and housekeeping records." *Id.* at 6a. The court also rejected petitioners' contention that the legislative history of the statute requires a different result, declining to accept the "invitation to use legislative history to supplant rather than to interpret the statute." *Id.* at 8a.

Proceeding to *Chevron* step two, the court of appeals rejected petitioners' contention that GRS 20 is irrational because it authorizes the destruction of all records on a given medium, without regard to each record's value or content. That argument, the court of appeals explained, "is based upon a misunderstanding of GRS 20 and the Archivist's rationale for adopting it." Pet. App. 9a. The court observed:

> GRS 20 does not authorize disposal of electronic records *per se*; rather, such records may be discarded only after they have been copied into an agency recordkeeping system. Therefore, GRS 20 seems to us to embody a reasoned approach to accomplishing the potentially conflicting goals of the Congress: "[j]udicious preservation and disposal of records." [44 U.S.C.] § 2902(5).

Pet. App. 9a (footnote omitted).

The court of appeals also rejected petitioners' contention that GRS 20 fails to specify properly the "periods of time" after which records may be disposed of. "[W]e do not see," the court said, "how the phrase 'specified periods of time'" in Section 3303a(d) "can be said unambiguously to require the Archivist to select a period in terms of months or years." Pet. App. 11a. Instead, the court of appeals explained, it was permissible to read the phrase as permitting the Archivist to specify time periods based on triggering events. Here, the Archivist's reliance on those triggering

events was entirely reasonable: "[I]f the Archivist is to make the best determination of when records of a certain type will cease to have sufficient value to warrant their retention, then it is eminently sensible that he be able to rest that determination upon a future condition the occurrence of which will diminish the value of the records, without requiring that he predict precisely when that will occur." *Id.* at 12a.

The court of appeals also rejected petitioners' contention that GRS 20 is arbitrary and capricious. It explained that the Archivist made an explicit finding that the records on "live" desktop computer applications lack sufficient value to warrant continued preservation once they have been transferred or preserved to a paper, electronic, or some other form of recordkeeping system. Pet. App. 13a. While petitioners contended that electronic records can be searched, manipulated and indexed in ways that paper records cannot, the court of appeals noted that such searching, indexing, and manipulation was not possible with respect to records on "live" office systems, such as individual personal computers. "Public Citizen's argument ignores [the] obviously material difference between the value of records that are part of an agency's centralized recordkeeping system and the value of those that are accessible only by searching a particular personal computer. We do not think the Archivist acted unreasonably in discounting the comparative value of 'disparate electronic files maintained by individuals rather than in agency-controlled recordkeeping systems.'" *Id.* at 15a (quoting 60 Fed. Reg. at 44,646).

Finally, the court of appeals rejected petitioners' contention that GRS 20 is arbitrary and capricious because electronic records may contain information that is not contained in the printed version. Pet. App. 18a.

With respect to electronic mail, the court noted, GRS 20 expressly requires that the agency recordkeeping system capture all relevant transmission data. *Ibid.* With respect to word processing files, the court of appeals interpreted GRS 20—in light of the preamble's statement that recordkeeping systems must preserve the document's "content, structure, and context"—as likewise mandating the preservation of all records information associated with electronic files, including "hidden" information that might not ordinarily print out. *Id.* at 18a-19a.

ARGUMENT

The court of appeals held that GRS 20 reflects a reasonable interpretation of the Records Disposal Act. That decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, this Court's review is not warranted.

1. This case arises out of the proliferation of desktop computer applications used to create federal agency records. The Archivist found that records generated on "live" desktop computer programs used by individual agency employees—such as electronic mail or word processing systems—must be deleted from those systems to ensure proper records management and to avoid computer overloads that would lead to system failure. See 60 Fed. Reg. 44,643, 44,644 (1995). The Archivist also found that records left on "live" computer systems are of little value to agency personnel and outside researchers once they have fallen out of use, since they are often inaccessible or unknown to anyone but their creator, and cannot be indexed or searched efficiently. *Id.* at 44,645.

The Archivist adopted the present version of GRS 20 as a rational and pragmatic response to those findings.

GRS 20 requires agencies to preserve specified electronic records by transferring them to the agency's official recordkeeping system, whether that system is electronic, paper, or microform. That recordkeeping system must preserve the records' "content, structure, and context for their required retention period." 60 Fed. Reg. at 44,644. Only after the records are properly preserved in such a recordkeeping system may unused and unneeded copies be deleted from the agency's "live" computer applications.

Petitioners contend (Pet. 14-17) that the Archivist acted unreasonably by authorizing the deletion of electronic records regardless of their value. However, as the court of appeals recognized (Pet. App. 14a-15a), petitioners' argument reflects a persistent misunderstanding of what GRS 20 does. GRS 20 does not authorize the deletion of records from the agency's electronic or other *recordkeeping* systems. Nor does it address the separate question of what kind of recordkeeping system agencies should have. GRS 20 simply authorizes the deletion of material from "live" computer desktop systems *after* that material has been transferred to an agency recordkeeping system that preserves each record's content, structure, and context.

In that respect, the Archivist expressly considered the value of records maintained on "live" desktop computer applications and concluded that, once they have been "copied" to a recordkeeping system, their value is insufficient to warrant continued preservation. As the Archivist explained:

> For records to be useful they must be accessible to all authorized staff, and must be maintained in recordkeeping systems that have the capability to group similar records and provide the necessary

> context to connect the record with the relevant agency function or transaction. Storage of electronic mail or word processing records on [live] electronic information systems that do not have these attributes will not satisfy the needs of the agency or the needs of future researchers.

60 Fed. Reg. at 44,644. Accordingly, the Archivist determined that maintaining electronic records on "live" word processing and electronic mail systems "that do not provide the necessary records management functions, just for the sake of maintaining [those records] in electronic format as many respondents advocate * * * would be of limited use to both the originating agency and to future researchers." *Id.* at 44,645. "Such a practice would not support agency operations, and researchers would have to search disassociated, unindexed collections of materials for potentially valuable records, which would result in finding a large proportion of irrelevant documents, and inefficient use of research time." *Ibid.* See also *id.* at 44,644 ("Search capability and context would be severely limited if records are stored in disparate electronic files maintained by individuals rather than in agency-controlled recordkeeping systems.").

Petitioners' lengthy discussion of the importance of electronic records (Pet. 14-15) thus amounts to nothing more than a disagreement with the Archivist's reasoned conclusions. Moreover, petitioners' analysis is based on the incorrect assumption that the electronic records subject to GRS 20 are stored on publicly-accessible, centralized computer systems. For instance, petitioners contend (Pet. 14) that electronic records can be "distributed more easily and more widely" and "searched and indexed more easily." But petitioners

overlook the fact that GRS 20 governs the disposition of records contained on "live" desktop computer applications residing, for example, on separate personal computers in individual offices. There is no reason to believe that functions like indexing, searching and distribution currently would prove any easier from those myriad individual computers than they would from the centralized, indexed, and organized paper copies kept in an agency's centralized recordkeeping system.

Petitioners also take issue with the Archivist's finding that electronic records are of limited use unless they are maintained in a centralized recordkeeping system. Pet. 17. In particular, they argue that the finding "is not the same as finding that the electronic records lack *any* 'administrative, legal, research or other value' that would warrant further preservation, as 44 U.S.C. § 3303a(d) requires." Pet. 17. Petitioners misread the statute. Section 3303a(d) does not require a finding that the records lack *any* administrative, legal, research, or other value. It requires only that, in the Archivist's judgment, the records lack "*sufficient* administrative, legal, research, or other value to warrant their further preservation by the United States Government." 44 U.S.C. 3303a(d) (emphasis added). The Archivist reasonably determined that records maintained on "live" computer applications are of little (*i.e.*, not "sufficient") value once they are no longer in use and have been duplicated—in a printed, microform, or electronic form that preserves all relevant information—in the agency's centralized recordkeeping system.

Petitioners also suggest (Pet. 17-18) that GRS 20 is flawed because it does not address whether an agency's recordkeeping system should be electronic, paper or

microform. Petitioners apparently believe that it is unreasonable for the Archivist to authorize deletion of electronic material from "live" computer applications—even if system overload is threatened—unless the agency's official recordkeeping system will store copies *electronically*. Petitioners, however, point to nothing in the statute requiring agencies to use an electronic rather than paper recordkeeping system. Pet. App. 17a. In any event, the development of appropriate recordkeeping systems is a separate matter beyond GRS 20's scope. 60 Fed. Reg. at 44,644 ("Separate * * * guidance and regulations instruct agencies to appropriately preserve records that are produced through office automation in the form that they determine is best to accomplish their mission within their administrative and fiscal capabilities."). See also *id.* at 44,634, 44,635, 44,639. Indeed, we are informed that for that very reason the Archivist has been working with individual agencies—outside of GRS 20 proceedings—to encourage and aid the move to electronic recordkeeping, which the Archivist considers worthwhile in the long-term. That process, however, has little to do with the validity of GRS 20, which does not address whether an agency's recordkeeping system should be paper, microform, or electronic. As the court of appeals noted: "[The Archivist's] decision to permit agencies to maintain their recordkeeping systems in the form most appropriate to the business of the agency is reasonable. Nor does [petitioner] claim that agencies have a legal duty to establish electronic recordkeeping systems." Pet. App. 17a.[6]

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[6] Petitioners suggest (Pet. 16) that the Archivist need not require all agencies to develop electronic recordkeeping systems, but instead can approve individual agency disposition schedules or

2. Petitioners also ask this Court to resolve an alleged conflict among the circuits regarding the degree to which courts should defer to agency interpretations first articulated during litigation. See Pet. 19-26. This Court has held that courts normally should not accord deference to "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). However, this Court has recognized that deference to an agency's interpretation of its own regulations may be appropriate even if that interpretation "comes * * * in the form of a legal brief" where the interpretation is "in no sense a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action from attack" and there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) (quoting *Georgetown Univ. Hosp.*, 488 U.S. at 212). See also *Gardebring* v. *Jenkins*, 485 U.S. 415, 429-430 (1988). There is no conflict, however, on that issue in the courts of appeals. In any event, the agency's positions in this case were fully grounded in the administra-

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narrower general schedules that distinguish electronic records that must be preserved electronically. Again petitioners miss the point. Whether an agency maintains an electronic recordkeeping system or a paper recordkeeping system, material on "live" computer desktop applications must be deleted to ensure proper records management and avoid system overload. Thus, despite petitioners' protestations to the contrary, petitioners' approach would mandate that agencies either adopt electronic recordkeeping or maintain records on "live" systems indefinitely and risk potential system failure as a result. There is no statutory basis for such a requirement, and the Archivist did not act unreasonably in declining to adopt it.

tive record, the rationale set out in the notice adopting GRS 20, and prior agency practice.

a. According to petitioners, most courts of appeals will not defer to agency positions set forth in court except where the agency is not a party and submits its views in the form of an amicus brief. Pet. 21. The District of Columbia Circuit and the Third Circuit, petitioners seem to argue, are more amenable to deferring to agency litigating positions. See Pet. 22. Petitioners misread the cases.

For example, while petitioners characterize several cases as holding that agency positions articulated in litigation do not warrant deference *unless* the positions are asserted in an amicus brief, see Pet. 21-22, the cases on which petitioners rely do not so hold. Three of the decisions cited by petitioners merely hold that, consistent with this Court's decisions, deference *is* appropriate to an agency position articulated in an *amicus* brief so long as the position is not a post hoc rationalization to defend past agency action, and the interpretation appears to reflect the agency's fair and considered judgment. See *Jones* v. *American Postal Workers Union*, 192 F.3d 417, 427 (4th Cir. 1999); *Hertzberg* v. *Dignity Partners, Inc.*, 191 F.3d 1076, 1082 (9th Cir. 1999); *Norwest Bank Minnesota Nat'l Ass'n* v. *Sween Corp.*, 118 F.3d 1255, 1259 n.5 (8th Cir. 1997). None of those decisions establishes a per se bar against deferring to the agency's considered view of a matter under appropriate circumstances simply because the agency expresses its view as a party or by means other than an amicus brief.

Nor do the two decisions of the Seventh Circuit cited by petitioners (see Pet. 21-22) adopt that rule. In *Doe* v. *Mutual of Omaha Insurance Co.*, 179 F.3d 557, 563 (7th Cir. 1999), cert. denied, 120 S. Ct. 845 (2000) (see

Pet. 21), the Seventh Circuit held only that deference was inappropriate when an agency filed an amicus brief taking a new and "radical stance" on an issue, when the agency had never addressed the issue before. 179 F.3d at 563. And in *Harco Holdings, Inc.* v. *United States*, 977 F.2d 1027, 1035 (7th Cir. 1992) (see Pet. 22), the court of appeals merely refused to accord deference to an agency interpretation that was "not only new and unsupported by agency practice or rulings," but also "internally inconsistent." See also *William Bros., Inc.* v. *Pate*, 833 F.2d 261, 265 (11th Cir. 1987) (refusing to defer to a "novel position" raised in litigation where the agency has adopted a contradictory position on related issues). Thus, neither of those cases holds that courts may not defer to agency positions articulated in litigation unless they are expressed in amicus briefs. Instead, by relying on the inconsistent or radical nature of the agency's approach, those cases merely implement this Court's admonitions that deference is not appropriate for "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice," *Georgetown Univ. Hosp.*, 488 U.S. at 212, or where there are other reasons to doubt that the positions reflect "the agency's fair and considered judgment," *Auer*, 519 U.S. at 462.

Petitioners' effort to characterize District of Columbia Circuit and Third Circuit case law as inappropriately receptive to agency litigating positions (Pet. 22-23) likewise is not well supported. In *Tax Analysts* v. *IRS*, 117 F.3d 607 (D.C. Cir. 1997) (see Pet. 22-23), for example, the court of appeals stated that "[o]ne might consider" the agency's interpretation of its decisions to be "a litigation position," but noted that such a characterization "would not *necessarily* preclude * * * defer[ence] to the agency's interpretation." 117 F.3d at

613 (emphasis added). The court, however, did not find it necessary to resolve the deference question because it concluded that the IRS intepretation at issue was not permissible, and could not be upheld, even if deference was proper. *Id.* at 616. Likewise, in *United Seniors Ass'n* v. *Shalala*, 182 F.3d 965, 971 (1999) (see Pet. 23), the District of Columbia Circuit acknowledged (in *dictum*) that it may be appropriate to defer to agency views expressed in legal briefs "under the appropriate circumstances." There, however, the court concluded that deference was appropriate because the agency's position was firmly established prior to the litigation, having been repeatedly and consistently expressed—and adhered to—in the past. And in *National Mining Ass'n* v. *Babbitt*, 172 F.3d 906 (1999) (see Pet. 23), the District of Columbia Circuit noted (again in *dictum*) that courts may, "under the appropriate circumstances," defer to agency views expressed in legal briefs. The court of appeals, however, *declined* to defer to the agency's construction there because the court could not understand what the agency's position was, 172 F.3d at 911, and because it found the regulations clearly arbitrary and capricious in any event, *id.* at 911-913.

Finally, petitioner is incorrect to claim (Pet. 22) that the Third Circuit's decision in *Connecticut General Life Insurance Co.* v. *Commissioner*, 177 F.3d 136, 144, cert. denied, 120 S. Ct. 496 (1999), establishes a circuit conflict. In that case, the court of appeals expressly recognized that it could not defer to an agency interpretation that is not supported by "regulations, rulings or administrative practice," and noted that it would not defer to "an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question." *Id.* at 143-144 (quoting *Georgetown*

Univ. Hosp., 488 U.S. at 212). The court later discussed deference to an agency position articulated in litigation, but only in the context of determining whether the agency in fact had expressly reserved judgment on a particular issue, or had instead articulated a view on the matter. 177 F.3d at 144. The decision hardly establishes a conflict among the circuits over the degree of deference accorded to agency interpretations articulated in litigation.

b. Even if there were a square conflict on this issue —and we do not believe there is one—the court of appeals in this case did not defer to mere litigation positions. Instead it deferred to positions that were well supported in the Archivist's decision, in the administrative record, and in established practice. Thus, while petitioners claim (Pet. 23) that the court of appeals thrice deferred to "new interpretations" offered for the first time in litigation, that claim is not correct.

Petitioners first contend (Pet. 11, 23) that the court of appeals deferred to the Archivist's view that the general records schedule authority contained in 44 U.S.C. 3303a(d) extends to so-called "program" records (and is not limited to "administrative" or "housekeeping" records), even though that construction was first articulated in the course of this litigation. But the court of appeals nowhere suggested that the Archivist's construction of Section 3303a(d) was novel or newly-articulated in this litigation. Nor was it. The Archivist in fact concluded that Section 3303a(d) extended to so-called program records (before this litigation began) in the notice announcing GRS 20.[7] The scope of GRS 20

[7] The Archivist explicitly addressed the objections, made by various commenters, that GRS 20 improperly authorized dis-

itself evidences that construction as well, since it was promulgated under Section 3303a(d) and unambiguously applies to program and housekeeping records alike. See *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 420 (1992) ("[W]e defer to an interpretation which was a necessary presupposition of" the agency's "decision."). Indeed, as the court of appeals noted (Pet. App. 10a), at least one *earlier* general records schedule expressly applied to program records. See 60 Fed. Reg. at 44,644. Thus, far from deferring to a novel litigating position on this issue, the court of appeals merely—and properly—deferred to the established and previously articulated interpretation of Section 3303a(d) adopted by the Archivist.[8]

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posal of "program" records. Program records, the Archivist noted, would be preserved in each agency's recordkeeping system:

> The critical point is that the revised GRS does not authorize the destruction of the recordkeeping copy of the electronic mail and word processing records. The unique program records that are produced with office automation will be maintained in organized, managed office recordkeeping systems. Federal agencies must have the authority to delete the original version from the "live" electronic information system to avoid system overload and to ensure effective records management. Program records that have been transferred to the recordkeeping system will not be affected by GRS 20. Their disposition is controlled by other general or specific records schedules.

60 Fed. Reg. at 44,644. The Archivist went on to explain that "[a]s indicated in the responses to comments above, the approval of GRS 20 will not affect unique program records that have been preserved in a recordkeeping system." *Id.* at 44,647.

[8] Contrary to petitioners' position, the Archivist's construction of Section 3303a(d) did not depart from prior practice. Pet. App. 10a-11a ("Public Citizen has identified no policy of the Archivist with which GRS 20 is inconsistent."). Although petitioner cites

Nor did the court of appeals defer to a mere litigating position when it upheld the Archivist's construction of the phrase "after the lapse of specified periods of time" in Section 3303a(d). See Pet. 12. The court of appeals concluded that, consistent with Section 3303a(d)'s language, the Archivist may specify time periods for record retention by using triggering events, such as the date on which the record is copied to a recordkeeping system; the court rejected petitioners' contrary position, under which the Archivist would be required to specify dates more "rigidly in terms of months or years." See Pet. App. 12a. In so doing, the court of appeals rejected petitioners' contention that the Archivist's flexible construction was first articulated in this litigation, finding that it was articulated "in GRS 20 itself." *Id.* at 12a n.* (quoting *National R.R. Passenger Corp.*, *supra*). The Archivist, in any event, has long construed Section 3303a(d) in the same manner, by issuing general records schedules for the disposition of records upon triggering events (*e.g.*, once the document is "superseded" or when the matter "is completed") since at least 1955. See Addendum to Defendants' Motion for Summary Judgment, Tab 27 (GRS 1, items 18a, c).[9]

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earlier statements indicating that general records schedules cover "administrative" records, those statements were made in a different context, *id.* at 10a, and do not assert that general records schedules cannot include program records as well.

[9] Indeed, until 1970, each of those general records schedules was expressly approved in congressional committee reports, C.A. App. 124, 126, which gave no indication of dissatisfaction with the Archivist's construction of the statute. Cf. *Haig* v. *Agee*, 453 U.S. 280, 291-300 (1981) (agency interpretation of statute may be ratified by Congress). In addition, Congress repeatedly amended the Records Disposal Act without taking issue with those

Nor did the court of appeals improperly defer to government counsel's interpretation of GRS 20 itself. See Pet. 12, 23. According to petitioner, the court of appeals placed inappropriate weight on counsel's clarification, at oral argument, that GRS 20 requires *all* information forming part of an electronic record—including "hidden comments or summaries that are not [ordinarily] printed out" and "the electronic equivalents of a Post-it note or an abstract"—to be printed out and preserved where a paper recordkeeping system is used. See Pet. App. 18a-19a. It is far from clear that the court of appeals in fact "deferred" to counsel's concession at argument. To the contrary, the court of appeals appears to have relied on that concession simply to clarify the argument made in the Archivist's brief, see *ibid.*—namely, that GRS 20 contains the very requirement that petitioners feared might be lacking, because GRS 20's preamble specifies that recordkeeping systems must preserve each record's "content, structure, and form."[10]

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schedules. See *Power Reactor Dev. Co.* v. *International Union of Elec. Workers*, 367 U.S. 396, 408 (1961) (congressional acquiescence in agency's construction, as communicated to a congressional committee, can support agency interpretation).

[10] Before referring to counsel's representation, the court of appeals recited the explanation in the Archivist's brief that the preamble that accompanied GRS 20's publication made it clear that even "hidden comments or summaries that are not printed out—the electronic equivalents of a Post-it note or an abstract"—must be printed out and stored in the recordkeeping system. Pet. App. 18a-19a. As the court observed (*id.* at 19a), the preamble expressly states that records may not be deleted until they have been transferred to a recordkeeping system that "preserves their content, structure and context." 60 Fed. Reg. at 44,644. The meaning of that directive is plain: If a record, such as a word processing file, necessarily includes comments or summaries appended

The paragraph following that discussion goes on to state that the Archivist's interpretation is entitled to deference even if it "comes for the first time in litigation," so long as there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." Pet. App. 19a (quoting *Auer*, 519 U.S. at 462). Because that statement appears to have been unnecessary to the judgment, it does not furnish a reason for further review. See *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956) (This Court "reviews judgments, not statements in opinions.").[11] Any deference to the agency's "fair and considered judgment," moreover, did not aggrieve petitioners. In the court of appeals, petitioners argued that the Archivist's regulations *should* require the preservation of otherwise hidden materials, like abstracts, comment fields, etc. Pet. App. 19a. The court of appeals merely concluded that GRS 20 in fact contains the very requirement petitioners were insisting upon. It is hard to see how petitioners can claim to be

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to it, the "content, structure and context" of the record cannot be preserved without that information as well. The court of appeals then cited government counsel's statement at oral argument as another way of stating the same conclusion: "In other words, as counsel for the Archivist put it at oral argument, if the information is part of a record * * * then it must be preserved." Pet. App. 19a. Finally, the court of appeals noted that that interpretation of GRS 20 is consistent with GRS 20's requirement that word processing files be "copied" to the recordkeeping system. Circuit case law, the court noted, holds that paper versions are not "copies" within the meaning of the FRA if they do not include all significant information contained in the electronic version. *Ibid.*

[11] See also *Chevron*, 467 U.S. at 842 ("this Court reviews judgments, not opinions"); *Herb* v. *Pitcairn*, 324 U.S. 117, 125 (1945) (noting that the Court's "power is to correct wrong judgments, not revise opinions").

aggrieved by the conclusion that GRS 20 includes a requirement that, in petitioners' view as well, should be part of GRS 20. See *ibid.* ("Considering the substance of" the Archivist's interpretation, "we trust that [petitioners are] not aggrieved by" deference). And, for the same reason, petitioners' challenge to the court of appeals' conclusion is largely academic in nature. It therefore does not warrant further review.

3. Finally, petitioners appear to argue that GRS 20 is contrary to various policy statements made by the Archivist. Pet. 10. Many of those policy statements, however, were made in the course of considering new alternatives in response to the district court's decision striking down GRS 20. There is no basis for using agency proposals designed to *comply* with a district court ruling that the agency has appealed as evidence that the district court's ruling is correct. Besides, the fact that the Archivist has discussed and considered changes to GRS 20 does not undermine the validity of the current rule, so long as the current rule is a reasonable alternative among many, which it is. An agency is entitled to consider varying interpretations and the wisdom of its policy on a continuing basis. *Chevron*, 467 U.S. at 863-864; see *Rust* v. *Sullivan*, 500 U.S. 173, 186-187 (1991).

Moreover, as petitioners' own brief makes clear, the Archivist has indicated (apart from this litigation) that he is considering changes to GRS 20 and agency record-keeping requirements. See Pet. 10. Further review of the Archivist's construction and application of the Records Disposal Act, if any, should await the Archivist's

announcement of a more permanent resolution of those matters.[12]

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[12] As we explained at greater length in our brief in opposition (at 26-28) in *Armstrong* v. *Executive Office of the President*, 520 U.S. 1239 (1997) (No. 96-1242), we believe that the Administrative Procedure Act (APA) does not afford petitioners a cause of action for judicial review of the recordkeeping requirements promulgated by the Archivist under the FRA. See also Gov't C.A. Br. 11 n.3 (preserving the issue in this case, while acknowledging that circuit precedent permitted APA review). To obtain APA review of administrative action, a plaintiff must show that "the injury he complains of * * * falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990). In *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 149 (1980), this Court stated that the FRA was enacted "not to benefit private parties, but solely to benefit the agencies themselves and the Federal Government as a whole." Also, review under the APA is unavailable when a legislative intent to preclude judicial review is "fairly discernible in the statutory scheme," *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 351 (1984); see 5 U.S.C. 701(a)(1). If the Court grants review, the question of petitioners' right to seek judicial review under the APA would be logically antecedent to (and a potential barrier to reaching) the merits-based questions raised in the certiorari petition. That alternative ground for affirmance of the court of appeals' rejection of petitioners' claims under the FRA provides an additional reason for the Court to deny review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States

PUBLIC CITIZEN, *ET AL.*

Petitioners,

v.

JOHN CARLIN,
ARCHIVIST OF THE UNITED STATES, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the
Court of Appeals for the District of Columbia Circuit

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. THE DECISION BELOW ERRONEOUSLY HELD THAT FEDERAL LAW GOVERNING PRESERVATION OF GOVERNMENT RECORDS IS INDIFFERENT TO THE FORMAT AND CONTENT OF THE RECORDS.

Respondents' Opposition is based almost entirely on portraying GRS 20 as a effort to relieve desktop computers crowded with unneeded, disorganized files. In doing so, the Opposition mischaracterizes GRS 20 and the consequences of the court of appeals' construction of 44 U.S.C. § 3303a.

First, Respondents repeatedly assert that GRS 20 is directed at "live" individual desktop computers that will be overloaded unless files are deleted. Opp. at 5, 13-14. GRS 20, however, is not limited to "live" systems. It also mandates the destruction of files that are stored "off-line" on floppy and hard disks, tapes, or other media. *See* Pet. App. at 70a. GRS 20 also applies to all types of computers, whether they be stand-alone personal computers, mainframes, or networked systems. *See* Pet. App. 69a (GRS 20 applies to the categories of records set forth in the schedule "regardless of the type of computer used to create or store these records").

Moreover, GRS 20 is not limited to systems that are confronting "overload" or to situations in which retention of the electronic files is difficult. GRS 20 applies equally to all agencies and computers, regardless of their technical capabilities. Thus, even if an agency can readily maintain the records in their electronic format, has no shortage of storage space, or has copied the files to magnetic storage media (*e.g.* tapes or disks) — GRS 20 directs the agency to destroy its electronic files once it has created a paper or microfilm copy for recordkeeping purposes.

Second, Respondents contend that the critical issue in GRS 20 is not the format or content of records, but whether the records are maintained in centralized files. GRS 20 is justified, Respondents assert, because the Archivist determined that the value of electronic records is minimal if the records are stored "on separate computers in individual offices," Opp. at 13, that "cannot be indexed or searched efficiently," *id.* at 5, 10, and that "petitioners' analysis is based on the incorrect assumption that the electronic records subject to GRS 20 are stored on publicly-accessible, centralized computer systems." *Id.* at 12-13.

However, GRS 20 is not limited to files on "separate computers in individual offices." It authorizes the destruction of *all* word processing and electronic mail files, even if they are centralized and can easily be indexed, searched and disseminated.

Moreover, the Archivist has long had regulations which require that agencies maintain their records, including electronic files, in organized files that can be indexed. 36 C.F.R. § 1222.50(b)(1). The significance of GRS 20 is that it considers the format in which records are organized to be irrelevant to whether they may have sufficient legal, research or other value to warrant their preservation. Under GRS 20, even if electronic files are in, or can be placed in, organized, searchable files, the Archivist has directed that the electronic files must be destroyed if a paper or microform copy has been made "for recordkeeping purposes." Pet. App. 70a-71a.

To give a concrete illustration, this Court's decisions are created electronically as word processing files before being printed in the official reports. Under GRS 20, once the electronic files have been used to print the reports that serve as

the "official" record, these files do not have any value that might warrant preservation of the electronic format, and the files must be destroyed "when no longer needed for updating or revision." Pet. App. at 70a-71a. GRS 20 leaves no room for consideration of fact that the electronic version can be used to disseminate information and facilitate research in ways that are not possible with paper or microform. Moreover, GRS 20 treats a cabinet secretary's memorandum of decision in the same way as routine correspondence of administrative personnel. Although this Court's opinions are exempt from GRS 20, *see* 44 U.S.C. § 2901(14), virtually all of the other opinions, memoranda, reports and other documents created by the federal government using word processing are now subject to destruction under GRS 20 once copied to paper or microform.

This result is inconsistent with experience and the Archivist's own statements acknowledging that the unique characteristics of electronic records make them valuable even if a copy exists in another form. *See* Pet. at 7-8. Indeed, the National Archives' own decisions on records appraisal show that, in some instances, because of the unique characteristics of electronic records, *both* the electronic and paper versions of records may have sufficient value to warrant their preservation. *See* Pet. at 15. Because GRS 20 treats the format of records as irrelevant to their value, it erroneously mandates the destruction of some electronic records that have sufficient value to warrant their continued preservation even if a paper or microform copy exists.

Third, the Opposition also mischaracterizes the issue presented here by adopting the court of appeals' assumption that 44 U.S.C. § 3303a requires that the Archivist adopt an all-or-nothing rule, *i.e.*, the only alternative to GRS 20 is to require

all agencies to retain all electronic mail and word processing records in electronic form, regardless of the records' value. This assumption is mistaken and represents the critical flaw in the court of appeals' reasoning.[1]

As the district court recognized, the disposition of electronic mail and word processing records can be authorized through agency-specific schedules that distinguish those records that are valuable from those that should be destroyed. *See* Pet. App. at 51a-52a. Indeed, such agency-specific schedules are the predominant means of determining whether government records should be destroyed or preserved because general schedules like GRS 20 are only used for about one-third of the volume of government records. *Id.* at 26a. Petitioners recognize that destruction of electronic records "certainly will be necessary and practical," but object to GRS 20 because it authorizes government-wide destruction of such records "without distinguishing valuable electronic records from useless ones." Pet. App. 31a. The decision below presents an important question that this Court should resolve because it takes the extraordinary position that 44 U.S.C. § 3303a allows the Archivist to decide that "an electronic mail message written by the Secretary of State regarding the President's decision to declare war on another country has the same value as GSA word processing file regarding procurement

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[1] *See* Opp. at 14-15 n. 6 ("petitioners' approach would mandate that agencies either adopt electronic recordkeeping or maintain records on 'live' systems indefinitely and risk potential system failure as a result."); Pet. App. at 17a (asserting that rejecting GRS 20 would "require all agencies that create electronic mail or word processing records either to establish electronic recordkeeping systems immediately or retain their electronic records until such time as they have electronic recordkeeping systems").

of desks, simply because both records were created by" word processing or electronic mail technology. Pet. App. at 42a.

Finally, Respondents close their Opposition by asserting that this Court should deny review because "the Archivist has indicated . . . that he is considering changes to GRS 20 and agency recordkeeping requirements," that would represent "a more permanent resolution of those matters." Opp. at 24-25. However, GRS 20 is a final agency rule, and the Archivist has no schedule for repealing it. Since 1995, this rule has authorized, and continues to mandate, the "permanent" and irrevocable deletion of the only electronic version of countless records in virtually every establishment of the federal government. Moreover, the court of appeals' construction of 44 U.S.C. § 3303a(d) opens the door to further use of general schedules to routinely authorize the destruction of the electronic versions of Internet documents, image files, databases and other records that are increasingly being created on government computers.

II. THE COURT OF APPEALS IMPROPERLY DEFERRED TO INTERPRETATIONS THAT WERE FIRST ARTICULATED BY LITIGATION COUNSEL AND ARE AT ODDS WITH THE AGENCY'S OWN STATEMENTS.

This Court's decisions, beginning with *Securities and Exchange Comm'n v. Chenery*, 318 U.S. 80 (1942), warn that courts must not give deference to positions developed by litigation counsel during judicial review because doing so intrudes "upon the domain which Congress has exclusively entrusted to an administrative agency." *Id.* at 88, 94-95. The case law discussed in the Petition shows that the District of Columbia Circuit has construed this Court's opinion in *Auer v.*

Robbins, 519 U.S. 452 (1997), to severely limit this principle and to require that courts give controlling deference to positions articulated for the first time by counsel defending a challenged agency action. *See* Pet. at 22-23.

In their Opposition, Respondents contend that the court of appeals' discussion of *Auer* here was "unnecessary to the judgment," and the decision below actually represents an unremarkable example of deference to an agency's construction of a statute and agency regulations. Opp. at 23. This characterization is erroneous. Rather, the court of appeals here accepted three separate interpretations as authoritative, even though (i) these interpretations were not articulated by the agency when the same issue was presented during the administrative proceedings, and (ii) they are inconsistent with the agency's out-of-court statements on these issues.

1. As the district court observed, "every general records schedule promulgated to date, except GRS 20, covers administrative housekeeping records common to all agencies." Pet. App. at 39a. Moreover, before promulgating GRS 20 and even during this litigation, the National Archives issued statements declaring that general record schedules should be "limited to common administrative records," 63 Fed. Reg. 54,503, 54,504/3 (Oct. 9, 1998); *see also* Pet. at 8, 10; Pet. App. 38a-39a (quoting additional statements limiting general schedules to administrative records).

Respondents assert that the Archivist addressed the apparent inconsistency between his past statements and GRS 20's application to all records "in the notice announcing GRS 20." Opp. at 19 & n.7. The passage Respondents quote, however, does not address departure from past practice. Moreover, the court of appeals did not rely on this passage to

justify the exceptional scope of GRS 20, but devised its own explanation for the departure, based on its own view of 44 U.S.C. § 3303(1) and the Archivist's statements. *See* Pet. App. at 9a-10a. This explanation does not appear in any of the Archivist's statements, and is inconsistent with his 1998 statement that GRS 20 needs changing because general schedules "should be applied to the disposition of routine administrative 'housekeeping' records, not programmatic records." John W. Carlin, *Moving Ahead on Electronic Records Challenges*, THE RECORD, Vol. 4, No. 3, at 4 (Jan. 1998).

Thus, even if the court of appeals' explanation for the departure from past practice is reasonable (which we dispute), it is not the Archivist's view, but a position developed by counsel to defend the Archivist's action in litigation. Affording controlling deference to such *post hoc* explanations is inconsistent with *Chenery*, and with the decisions of other circuit courts cited in the Petition. Pet. at 21-22.

2. Respondents also assert that the court of appeals' construction of the statutory phrase "after the lapse of specified periods of time," in 44 U.S.C. § 3303a(d), was articulated by the Archivist in promulgating GRS 20. Opp. at 21. Respondents, however, are not able to cite any statement by the Archivist that articulates the construction to which the court of appeals deferred. More importantly, Respondents' claim is inconsistent with the Archivist's notices in 1998 declaring that he "has determined that indefinite retention periods," such as "destroy when no longer needed," are "inappropriate under the GRS." 63 Fed. Reg. 41,869 (Aug. 5, 1998).

Thus, the Archivist's statements show that he failed to address the construction of this phrase when he promulgated GRS 20 in 1995 (although the issue was raised in the

comments), and when the Archivist did address the issue in 1998, he adopted a position that is incompatible with the litigation position to which the court of appeals deferred.

3. Finally, Respondents do not dispute that appellate counsel was the first to contend that GRS 20 requires that paper or microform copies must reproduce all of the information contained in the electronic format. Nor do Respondents dispute that, even during the district court litigation, the government conceded that GRS 20 did not require preservation of all electronic information. *See* Pet. App. 45a-46a (concluding that GRS 20 specifically requires dates of transmission and receipt, and names of recipients of electronic mail to be preserved, but does not require preservation of information unique to electronic format). Instead, Respondents argue that the court of appeals' decision to accept appellate counsel's new construction of the rule was not improper because it imposes a requirement "that petitioners feared might be lacking." Pet. App. at 22a.

However, by deferring to a new construction of GRS 20 developed *after* the administrative proceedings, the court of appeals upheld a rule that is materially different from the rule that the Archivist adopted. The Archivist's statement adopting GRS 20 makes clear that he did not interpret its language to require printing of all information forming part of the electronic record. Indeed, the Archivist narrowed the provisions concerning spreadsheets because, under his reading of GRS 20, information that does not appear on a paper print-out would *not* be preserved. *See* Pet. App. at 68a. Thus, appellate counsel's contention that GRS 20 requires that print-outs contain *all* electronic information (not just the information listed by the Archivist, *see* Pet. App. at 71a, Note), imposes new and potentially burdensome requirements that the Archivist never

considered. There is no way to determine whether the Archivist would have adopted GRS 20, or narrowed its provisions, if he had been aware of how it would be expanded by appellate counsel and the court of appeals.

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Respondents are certainly correct in observing that "[a]n agency is entitled to consider varying interpretations and the wisdom of its policy on a continuing basis." Opp. at 24. However, this Court's cases also hold that an agency may not continue to change its interpretations and policy during the course of litigation challenging the agency's decision, and then claim that its litigation position is entitled to deference as the position of the agency. *See Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 50 (1983). The decision below demonstrates that the District of Columbia Circuit now extends controlling deference to interpretations of regulations and statutes developed by litigation counsel rather than by the agency itself. That practice should be reviewed by this Court.

CONCLUSION

For the reasons stated above and in the Petition, this Court should issue a writ of certiorari to review the District of Columbia Circuit Court's holding that GRS 20 is consistent with the Records Disposal Act.

Respectfully submitted,

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